Petition

81-1746

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PUREX CORPORATION, a corporation,
Petitioner,

v.

THE PROCTER & GAMBLE COMPANY,
a corporation, and
THE CLOROX COMPANY,
a corporation,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

In 1963, the Federal Trade Commission held that the acquisition of Clorox Chemical Company by Procter & Gamble Company violated Section 7 of the Clayton Act in that it tended to create a monopoly and to lessen substantially competition in the liquid bleach industry. In *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), this Court affirmed the Commission's decision, holding that the acquisition threatened to entrench Clorox still further in the market. This Court also held that, as a result of the acquisition, entry barriers had been raised and competition had been lessened in the liquid bleach industry.

In the present case, a private action by Purex Corporation for damages stemming from the same acquisition, the United States District Court for the Central District of California overruled this Court's holding in *FTC v. Procter & Gamble Co.* and ruled that the liquid bleach industry is not conducive to a monopoly. Further, the lower court neglected to consider Clorox's further entrenchment in the market as an anticompetitive effect of the acquisition, although entrenchment was the principal anticompetitive effect feared by the FTC and this Court in holding the acquisition unlawful. Accordingly, the questions presented are:

1. Once the Supreme Court has held that an acquisition violates Section 7 of the Clayton Act because the acquisition tends to create a monopoly in the relevant market, may a District Court overrule the Supreme Court and find that the relevant market is not susceptible to monopolization?

2. Did the District Court, as affirmed by the Ninth Circuit, err in disregarding the prior determinations by this Court and the FTC that: (1) the liquid bleach industry was susceptible to monopolization; (2) entry barriers had been raised in the liquid bleach industry as a result of the acquisition; and (3) the principal anticompetitive effect threatened by the acquisition was the further entrenchment of Clorox in the liquid bleach market? and

3. Did the District Court, as affirmed by the Ninth Circuit, contravene the rule of *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), when it failed to evaluate Purex's claimed injuries with a view toward the anticompetitive effects feared by this Court and the FTC in holding the acquisition unlawful?

LIST OF ALL PARTIES

All the parties to the proceedings below are named in the caption to this petition.

LIST OF RELATED COMPANIES

Petitioner Purex Corporation has the following parent companies, partially-owned subsidiaries and/or affiliates:

Purex Corporation
- Brillo Manufacturing Company of Great Britain Limited
  - Subsidiaries thereof—
    - Brillo Manufacturing Company of Ireland Limited
    - Brillo Sales Company of Ireland Limited
    - Cuticura Laboratories Limited
      - Subsidiary thereof—
        - Rose Laird Ltd.
    - Martin Rubeck, Ltd.
    - Purex Engineering Services
    - Turco Chemical Products Limited
- Cuticura South Africa (Proprietary) Limited
- Freshpict Foods, Inc.
- Pacific Airmotive Corporation, Inc.
  - Subsidiary thereof—
    - Nicholas Land and Leasing Co.
- Pullman Scandinavian A.B.
- Purex Australia Pty. Limited
- Purex Canada Limited
- Purex de Panama, S.A.
- Purex Turco A.G.

Subsidiaries thereof—
Turco Nederland Produkten B.V.
Turco Products Belgium, S.A.
Turco Produkte A.G.
Societe de Produits Aseptiques Disinfectants Odorants
Subsidiary thereof—
Lucal
Societe Civile Immobiliere de L'Ocre
Turco Nederland Produkten B.V.
Subsidiaries thereof—
Turco-Chemic G.m.b.H.
Turco Produkten B.V.
Turco Products Belgium, S.A.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Purex Corporation ("Purex") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in the above-entitled case on December 7, 1981.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 664 F.2d 1105 (9th Cir. 1981) and is annexed hereto as Appendix A. The Memorandum of Decision of the United States District Court for the Central District of California ("District Court"), not officially reported, is annexed hereto as Appendix B. The District Court's Findings of Fact and Conclusions of Law, which accompanied its unreported Memorandum, are annexed

hereto as Appendix C. An earlier Opinion of the Court of Appeals in this case is reported at 596 F.2d 881 (9th Cir. 1979) and is annexed hereto as Appendix D. An earlier Opinion of the District Court in this case is reported at 419 F. Supp. 931 (C.D. Cal. 1976) and is annexed hereto as Appendix E.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 7, 1981. This Petition for Writ of Certiorari has been timely filed in accordance with the Order of Justice Rehnquist, dated March 3, 1982, which extended the time for filing this petition to and including March 20, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 28 U.S.C. § 1337.

STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides, in pertinent part, as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 7 of the Clayton Act, 15 U.S.C. § 18, provides, in pertinent part, as follows:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the

> whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 7 was amended in 1980 to read as set forth above. The amendments were of no significance to this action.

STATEMENT OF THE CASE

Respondent The Procter & Gamble Co. ("Procter"), the nation's largest manufacturer of household cleaning products, acquired Respondent The Clorox Company (formerly known as Clorox Chemical Company) ("Clorox") on August 1, 1957. The only product sold by Clorox at that time was liquid bleach, a household cleaning product. At the time of the acquisition, Clorox was the dominant firm in the liquid bleach market, enjoying a nationwide market share of almost 50% (*In re the Procter & Gamble Co.*, 63 F.T.C. 1465, 1562 (1963)). Petitioner Purex was Clorox's largest competitor, holding a 16% share of the national liquid bleach market (*id.* at 1536). The rest of the liquid bleach industry at the time of the acquisition consisted of four considerably smaller companies, whose market shares ranged between 2% and 6%, and a number of small regional producers, few with assets over $75,000 (*id.* at 1536-38).

On September 30, 1957, the Federal Trade Commission instituted proceedings which challenged Procter's acquisition of Clorox under Section 7 of the Clayton Act, 15 U.S.C. § 18. On November 26, 1963, the Commission ruled that the effects of the acquisition "may be substantially to lessen competition or to tend to create a monopoly" and ordered that Procter divest itself of Clorox (63 F.T.C. 1465). The Commission's Order was affirmed by this Court in *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

Purex commenced this action in 1967, following this Court's affirmance of the Commission's Order. Purex alleged that it suffered antitrust injuries as a result of the anticompetitive effects of, and the anticompetitive acts made possible by, Procter's unlawful acquisition of Clorox. Purex sought damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, alleging violations of Section 7 of the Clayton Act, 15 U.S.C. §18. Purex claimed that many of the consequences of the acquisition that had been apprehended by the Commission and by this Court in declaring the acquisition unlawful actually occurred and caused injury to Purex.

After a lengthy trial, the District Court ruled in favor of Procter and Clorox, declaring that the liquid bleach industry is "hardly conducive to monopoly" (*Purex v. Procter & Gamble Co.*, 419 F. Supp. 931, 949 (C.D. Cal. 1976)). The court found that while much of the conduct of which Purex complained had in fact occurred (*see id.* at 935, 936, 938-39, 942), including temporary below-cost selling by Procter/Clorox in response to Purex's attempt to enter the market in Erie, Pennsylvania (*see id.* at 940), the conduct was not anticompetitive (*id.* at 937). Rather, according to the District Court, Clorox's conduct amounted to "no more than the vigorous competition that one would expect among rivals in the marketplace." (*Id.*). The court acknowledged that "post-merger Clorox took market share from Purex" (*id.* at 949) and that Clorox's share of the market increased during the period of the acquisition (*id.* at 945), yet the court made no finding as to whether Clorox had become further entrenched in the liquid bleach market as a result of the acquisition. Entrenchment was the principal anticompetitive effect feared by both this Court and the FTC in holding the acquisition unlawful.

On appeal, the Ninth Circuit Court of Appeals vacated the District Court's judgment and remanded the case for reconsideration in light of this Court's ruling in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) and the ruling of the Court of Appeals in *Greyhound Computer Corp. v. IBM*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040

(1978). The Court of Appeals also authorized the District Court to hear additional evidence in connection with its reconsideration (*Purex v. Procter & Gamble Co.*, 596 F.2d 881, 888-89 n.7 (9th Cir. 1979); *id.* at 891 (concurring opinion)). Finally, the Court of Appeals directed the District Court to separate its findings of fact and conclusions of law to facilitate further appellate review (*id.* at 885, 889, 890).

Without taking any additional evidence on remand, the District Court announced that its judgment again would be in favor of Procter and Clorox. The District Court explained that it had considered the *Brunswick* and *Greyhound* cases but that "there is nothing in *Brunswick* or *Greyhound* that mandates, or even suggests, a different result than the one . . . announced after the trial." (District Court Memorandum of Decision at 2). The court made essentially the same findings, and reached the same conclusions, as in its first Opinion. The court again found that the liquid bleach industry is "hardly conducive to monopoly" (District Court Finding on Remand ("FR") 132). The court again found that much of the conduct of which Purex complained (conduct of exactly the type feared by this Court and the FTC) had actually occurred and that Clorox's dominant market share increased following the acquisition. Yet, the court again failed to address the issue of entrenchment. The only possible anticompetitive effect of the acquisition discussed by the court was "the subjective concern that might have discouraged Purex from aggressively competing with Clorox" for fear of a possible retaliation by Procter/Clorox (District Court Memorandum of Decision at 3). The court found that the acquisition did not produce such an effect.

On the subject of Procter/Clorox's below-cost selling in response to Purex's attempt to enter the Erie market, the District Court ruled that "[t]here was nothing anticompetitive about the Clorox response in Erie" (FR 95) and "Clorox's response in Erie was a reasonable, normal and usual method of competition and had a legitimate business purpose" (FR 96). In so ruling, the District Court disregarded this Court's prior conclusion that Procter/Clorox's conduct in Erie demonstrated

that entry barriers had been raised as a result of the acquisition (*FTC v. Procter & Gamble Co.*, 386 U.S. at 579 n.3).

Purex appealed from the District Court's decision on remand, arguing that the court had once again misapplied the law and had erroneously disregarded the earlier rulings by this Court and the FTC. Specifically, Purex contended that the lower court had erred in finding that Procter/Clorox's conduct, which was of the type feared by this Court, amounted to no more than "vigorous competition" when, in fact, the conduct resulted in the further entrenchment of Clorox in the liquid bleach market. Precisely the result cited by this Court and the FTC in holding the acquisition unlawful.

Even though Purex did not contend on appeal that the trial court's findings were unsupported by substantial evidence, the Court of Appeals nevertheless merely reviewed the findings of fact and concluded that they were not "clearly erroneous." On this basis, the Court of Appeals affirmed the trial court's decision. The Court of Appeals barely even addressed Purex's argument that the lower court had misapplied the law.

REASONS FOR GRANTING THE WRIT

I. In Concluding That The Liquid Bleach Industry Is "Hardly Conducive To Monopoly," And In Refusing To Consider Entrenchment As A Possible Anticompetitive Effect Of The Acquisition, The District Court Overruled A Prior Decision Of This Court.

This Court's ruling that Procter's acquisition of Clorox violated Section 7 of the Clayton Act was premised upon its conclusions that the liquid bleach industry was conducive to monopoly and that the acquisition tended to create such a monopoly. The District Court's finding that the industry is "hardly conducive to monopoly," in effect, overruled the 1967 decision of this Court.

Two months after Procter's acquisition of Clorox in 1957, the Federal Trade Commission instituted proceedings which

challenged the acquisition under Section 7 of the Clayton Act. At that time, Clorox was by far the dominant firm in the liquid bleach market, enjoying a nationwide market share of almost 50% (*In re the Procter & Gamble Co.*, 63 F.T.C. at 1562). In the Commission's view, the industry was decidedly unhealthy, from the standpoint of competition, and the acquisition threatened to exacerbate the problem (*id.* at 1574-75 ("[A]t the time of the acquisition, the market structure of the [liquid bleach] industry, from the standpoint of the maintenance of a competitive regime, was already decidedly unhealthy."); *id.* at 1563 (even before the acquisition, the liquid bleach industry "was concentrated, and barricaded to new entry, to a degree inconsistent with effectively competitive conditions")). That the industry was barricaded to new entry is demonstrated by the fact that Procter, as powerful as it was, chose to spend approximately $30 million (a substantial sum in 1957) in order to acquire Clorox, rather than attempt to enter the market on its own.

In 1963, the Commission finally ruled that Procter's acquisition of Clorox violated Section 7 of the Clayton Act because it threatened both to create a monopoly and to lessen substantially competition in the liquid bleach industry. In explaining its conclusion, the Commission announced:

> [W]e are persuaded that a merger involving a leading firm in a market that is already well on the way to a non-competitive structure may be unlawful under Section 7 even where the aggravation of non-competitive market conditions by the merger may seem relatively slight because of the already advanced oligopoly condition of the market. Perhaps conceptual difficulties are encountered if such a merger is deemed to violate Section 7's "substantially to lessen competition" clause, since effective competition may already have substantially disappeared. If so, resort may be had, with entire propriety, to the statute's tendency-to-monopoly clause. For " 'tend to create a monopoly' clearly includes aggravation of an

> existing oligopoly situation." *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 607 (S.D.N.Y. 1958).

(63 F.T.C. at 1577).

The Commission found that the acquisition raised entry barriers in the industry and threatened to entrench Clorox as the market leader:

> Procter, by increasing the Clorox advertising budget, by engaging in sales promotions far beyond the capacity of Clorox's rivals, and by obtaining for Clorox the advertising savings to which Procter, as a large national advertiser, is entitled, is in a position to entrench still further the already settled consumer preference for the Clorox brand, and thereby make new entry even more forbidding than it was prior to the merger. . . .
>
> *In short, the barriers to entry, already very high, have been markedly heightened by the merger*—to the point at which few firms indeed would have the temerity or resources to attempt to surmount them. And, as has been observed, a heightening of entry barriers concomitantly enhances the power of market leaders to dominate their small rivals, and so smother effective competition.

(*Id.* at 1568, emphasis added).

In affirming the Commission's ruling that Procter's acquisition of Clorox violated Section 7, this Court expressed its own fear that the acquisition would lead to a monopoly for Clorox. Noting that Clorox's pre-merger market share "approached monopoly proportions in certain areas" (*FTC v. Procter & Gamble Co.*, 386 U.S. at 578), this Court concluded: "[T]he substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing . . . ." (*Id.*). Indeed, in this Court's view, there was no question but

that the merger had in fact raised barriers for entry into new geographical markets by established firms (*id.* at 579 n.3).[1]

It is manifest that in holding the acquisition unlawful under Section 7, both this Court and the FTC were principally concerned with the very real possibility that Clorox, through the use of advertising discounts and Procter marketing power, would become further entrenched in the liquid bleach market and that Clorox's market share, which approached monopoly proportions in some areas, would increase even further following the infusion of Procter's vast resources.[2]

With this background of judicial and administrative concern regarding Clorox's entrenchment in the liquid bleach market, and in the face of declarations by both this Court and the FTC that entry barriers had been raised as a result of the acquisition, the District Court proceeded to evaluate Purex's claim that Clorox had, in fact, become entrenched as a result of the acquisition, to Purex's damage. Incredibly, the District Court announced that the liquid bleach industry is not conducive to a monopoly and that entry barriers had not been raised as a result of the acquisition (*see* FR 64, 68, 128, 132).

This Court's 1967 ruling that Procter's acquisition of Clorox violated Section 7 affirmed an FTC opinion that expressly relied on both grounds set forth in the statute, *i.e.*, the

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[1] While the typical Section 7 holding is prospective in nature and assesses the legality of an acquisition by considering the likely future impact of the acquisition (*see* Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977)), in this case the merger had been implemented almost ten years before this Court affirmed the FTC's finding of illegality. Some of the actual effects of the acquisition had already occurred and they were carefully examined by this Court. Thus, this Court's conclusion that entry barriers had been raised as a result of the acquisition (*see* FTC v. Procter & Gamble Co., 386 U.S. at 579 n.3) was based on observable evidence—it was not simply a prediction.

[2] Commentators, too, have noted that market entrenchment was the principal anticompetitive effect feared by the FTC and by this Court in declaring the acquisition unlawful (*see, e.g.*, ABA Antitrust Section, Monograph No. 7, Merger Standards Under U.S. Antitrust Laws 65-66 (1981) ("Product extension mergers, such as that at issue in *Procter & Gamble*, may be susceptible to antitrust challenge on an 'entrenchment' theory.") (footnote omitted)).

FTC ruled that the acquisition tended both to lessen competition and to create a monopoly in the liquid bleach industry (*see In re the Procter & Gamble Co.*, 63 F.T.C. at 1577). Thus, in affirming the Commission's decision, *this Court necessarily determined that the liquid bleach industry is conducive to monopoly.* (Certainly an acquisition cannot "tend to create a monopoly" unless the industry in which the acquisition occurs is susceptible to being monopolized.)

In ruling that the liquid bleach industry is "hardly conducive to monopoly," the District Court overruled this Court's prior determination on the same issue.

The District Court's belief that the bleach industry is "hardly conducive to monopoly" emerged from its findings that the product is easy to make, it is an item of frequent purchase, and it is distributed through retail grocery stores which also market their own private label bleach (FR 128-32). While the court suggested that this Court and the FTC did not appreciate the significance of these factors (FR 131), they were all obviously present and considered when the Supreme Court found that "Clorox enjoyed a dominant position nationally, and its position approached monopoly proportions in certain areas." (*FTC v. Procter & Gamble Co.*, 386 U.S. at 578).

With respect to Purex's abortive attempt to enter the market in Erie, Pennsylvania, the District Court found: "There was nothing anticompetitive about the Clorox response in Erie.... Clorox's response in Erie was a reasonable, normal and usual method of competition...." (FR 95, 96). This finding is flatly inconsistent with this Court's own analysis of the relevant facts and this Court's conclusion that Procter/Clorox's conduct in Erie demonstrated that entry barriers had been raised as a result of the acquisition (*FTC v. Procter & Gamble Co.*, 386 U.S. at 579 n.3). Likewise, the District Court's findings disregard the unqualified conclusion of the FTC: "[T]he barriers to entry, already very high, have been markedly heightened by the merger—to the point at which few firms indeed would have the temerity or resources to attempt to

surmount them." (*In re the Procter & Gamble Co.*, 63 F.T.C. at 1568).

Further, the District Court ignored this Court's conclusion that market entrenchment was an anticompetitive effect of the merger. When it came time to focus on the anticompetitive effects of the acquisition, the District Court considered only whether Purex had been intimidated by Procter/Clorox; the court failed even to examine the question of Clorox's entrenchment in the market. The District Court declared:

> The first alternative test under *Brunswick* is whether or not there were anticompetitive *effects* of the Section 7 violation that damaged the plaintiff, apart from "anticompetitive acts" made possible by the violation. *Such effects must pertain to the subjective concern that might have discouraged Purex from aggressively competing with Clorox for fear of the retaliation that the latter could bring to bear,* having been made much stronger as a result of the merger.

(District Court Memorandum of Decision at 3, second emphasis added).

Once the District Court found that Purex had no fear of competing with Procter/Clorox, it ruled that the anticipated consequences of the acquisition never ripened into reality (*see* FR 167 *et seq.*). The District Court refused to recognize that one of the threatened anticompetitive effects of the acquisition was the entrenchment of Clorox and that this anticompetitive effect did in fact occur. The District Court's conclusion that, as a matter of law, the violation could have no anticompetitive effect other than to discourage Purex from aggressively competing for fear of retaliation by Procter/Clorox flatly contradicts the holdings of this Court and the FTC that the further entrenchment of the already dominant Clorox was the principal anticompetitive effect that might flow from the acquisition.

II. Because Of The District Court's Erroneous Conclusion Concerning The Structure Of The Liquid Bleach Industry, The Court Failed To Appreciate The Overwhelming Evidence That Clorox Had Become Entrenched In The Industry, To Purex's Damage.

Because of the District Court's erroneous conclusion that the liquid bleach industry is not conducive to monopoly, the court failed to appreciate the significance of the evidence presented by Purex. Indeed, the District Court failed to appreciate the legal significance of its own findings, which establish that Clorox became further entrenched in the liquid bleach market during the period when it was owned by Procter (*see, e.g.*, FR 79 (during period of acquisition, Clorox's share of market increased and the share held by Purex brand bleach decreased); 419 F. Supp. at 949 ("[P]ost-merger Clorox took market share from Purex . . . .")).

As the District Court acknowledged, bleach is simple to make and uniform in chemical composition, and Clorox was consistently the most expensive brand on the market. Far from supporting the court's conclusion, the fact that liquid bleach is an unpatented product and is so easy to manufacture serves to highlight the significance of the massive share figures Procter managed to maintain in a market that should have been easy to enter. Because of the court's stubbornly and erroneously held view that the industry was incapable of being monopolized, the court failed to appreciate the significance of Clorox's ever-increasing market share and the resulting decrease in Purex's market share. This failure is particularly significant and mystifying in view of the fact that other recognized tests for the existence for monopoly power (although never mentioned by the court) point to the same conclusion as the share data.

For example, the relative size and strength of the firms in the market have universally been held to be greatly significant (*United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946)). Yet, the indisputable fact that Procter dwarfed the entire liquid bleach industry was completely ignored in the lower court's

analysis. Similarly, the actual exclusion of competitors from a particular market shows the existence of exclusionary power (*American Tobacco Co. v. United States, supra; United States v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945)). Still, the numerous examples of Procter/Clorox's actual exercise of exclusionary power (in Erie and elsewhere) were given no weight by the District Court.

Because of the District Court's preconceived notion that the liquid bleach industry was incapable of being monopolized, the court viewed the Erie response and other exclusionary conduct simply as good competition. The relevant facts were never of interest to the court. In effect, the District Court held that because the product is unpatented and requires little capital investment, entry into the industry is necessarily easy. Given this erroneous premise, the District Court had no use for analyses of share figures and other standard tests for market power.

This simplistic view was, of course, expressly rejected by the FTC and this Court, which found that entry barriers "already formidable" became "virtually insurmountable" as a result of the acquisition (63 F.T.C. at 1575; *see also* 386 U.S. at 579). The fallacy of the District Court's reasoning is highlighted by the following simple question: Given the fact that Procter was immensely profitable and that Clorox in vast sections of the country had growing market shares of 60, 70 and 80%, if entry was so easy, why did no significant new entrants appear? If Clorox's massive share did not evidence market power, and if it would have been simple and cheap to break Clorox's stranglehold on the market, then substantial new entrants should have been attracted into the liquid bleach market. Such new entrants, however, never appeared. To the contrary, the number of branded bleach competitors actually decreased. This result could never have arisen in a competitive system unless the dominant producer possessed the power to raise the cost of entry to such a level that rational businessmen would decline to enter the field.

III. Review By Writ Of Certiorari Is Proper, And Should Be Granted, To Correct A Lower Court Decision That Overrules A Prior Decision Of This Court.

A fundamental principle of federal jurisprudence is that once the Supreme Court has reached a conclusion of law on a federal matter, that conclusion is binding on the lower federal courts: "A decision of the Supreme Court of the United States is binding on federal matters on all other courts, federal or state." (1B *Moore's Federal Practice* ¶ 0.402[1] at 63 (1980) (footnote omitted); *see Mengelkoch v. Industrial Welfare Commission*, 284 F. Supp. 950, 955 (C.D. Cal.), *appeal dismissed*, 393 U.S. 83 (1968) ("A Supreme Court decision is as binding as statutory law. The district court, even sitting as a three-judge tribunal, cannot reverse the Supreme Court.")). The District Court's utter disregard for this Court's well-reasoned conclusions was plainly wrong and requires correction by this Court.

Review by Writ of Certiorari has frequently been granted when the decision of a lower federal court conflicts with a prior ruling by this Court (Stern & Gressman, *Supreme Court Practice* § 4.3 at 264 (5th ed. 1978) ("A well-established ground for granting certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by the Supreme Court . . . . "); *see, e.g., Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 364 (1940)("Because of petitioner's claim that the result below was inconsistent with the decisions of this Court, we granted certiorari.")). Further, Rule 17 of the Supreme Court Rules indicates that one ground upon which this Court may rely in granting review on Writ of Certiorari is the following: "When a . . . federal court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this Court." (Supreme Court Rule 17.1(c)). The Ninth Circuit's cursory affirmance of the District Court's erroneous opinion resulted in the circuit court's adoption of a conclusion that conflicts with a prior decision of this Court. Accordingly, this case falls squarely within the scope of Rule 17.

IV. The District Court Failed To Evaluate Purex's Injuries With A View Toward The Anticompetitive Effects That Were Feared By This Court And The FTC In Holding The Acquisition Unlawful.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court held that a plaintiff seeking to recover treble damages on account of Section 7 violations must prove, *inter alia*, that the injury "flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." (*Id.* at 489). The final question raised by this case concerns *Brunswick's* requirement that plaintiff's injury reflect the "anticompetitive effects" of the unlawful acquisition: Did the District Court contravene the rule of *Brunswick* when it failed to evaluate Purex's claimed injuries with a view toward the anticompetitive effects feared by this Court and the FTC in holding the acquisition unlawful?

As discussed above, the principal concern of the FTC, and of this Court, in declaring the acquisition unlawful was that the infusion of Procter's vast resources and advertising capabilities would further entrench Clorox in the liquid bleach market. In other words, *that which made Procter's acquisition of Clorox unlawful was, in part, the possibility that Clorox would become further entrenched in the liquid bleach market.*

Brunswick clearly required the District Court to evaluate Purex's claimed injuries in light of that which made the acquisition unlawful in the first place (*see Brunswick*, 429 U.S. at 489 ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."). As shown in Part II above, the District Court's erroneous rejection of this Court's conclusion concerning the market structure of the liquid bleach industry resulted in the lower court's failure to consider properly the evidence that Clorox had become entrenched in the liquid bleach market. In the District Court's view, the market was not susceptible to monopolization and that, in effect, ended the inquiry. In failing

to consider properly the evidence of Clorox's entrenchment and its impact on Purex (an impact recognized by the District Court itself (*see* 419 F. Supp. at 937, 949)), the court failed to follow the dictates of *Brunswick*.

This Court has not addressed the subject of Section 7 of the Clayton Act since the 1977 decision in *Brunswick*. The present case offers the Court a perfect opportunity to clarify the meaning of *Brunswick* for the benefit of all litigants under Section 7.[3] These antitrust litigants are in desperate need of such clarification inasmuch as *Brunswick* is the only case in which this Court has examined the elements of a claim for damages under Section 7. The dearth of authority on this subject has resulted in widespread confusion concerning the requirements of Section 7. (*See* Note, "*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*: Injury and Causation Under Sections 4 and 7 of the Clayton Act," 10 Sw. U.L. Rev. 667, 676 (1978)).

Further, a clarification of *Brunswick* and Section 7 would be of incalculable value to the business community in every region and market in the country, particularly in light of the well-publicized trend toward mergers of major corporations that has been gathering momentum in recent months (*see* Scherer, "*Corporate Weddings" Spur Antitrust Watch*, Christian Sci. Mon., Nov. 10, 1981, at 1 (characterizing the recent trend as "merger mania"); *Garfinkel Sale to N.Y. Firm Set at $228 Million*, The Wash. Post, Sept. 2, 1981, at A1 (citing three recent multimillion-dollar mergers as reflective of "a rampant trend among U.S. corporations")).

Purex at trial proved what actually happened in the liquid bleach industry: Procter acquired Clorox in violation in Section 7 of the Clayton Act; following the acquisition, Clorox became further entrenched in the liquid bleach market; this Court had cited the possibility that such entrenchment would arise in

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[3] The number of private claims under Section 7 has risen in recent years, and some authorities have predicted "that such private enforcement activity will continue to increase . . . ." (*see, e.g.*, ABA Antitrust Section, Monograph No. 1, Mergers and the Private Antitrust Suit: The Private Enforcement of Section 7 of the Clayton Act Policy and Law 43 (1977)).

explaining its ruling that the acquisition was unlawful; Clorox's further entrenchment had a negative impact on Purex's position in the market; and Purex suffered damage as a result of that impact (*see Purex v. Procter & Gamble Co.*, 419 F. Supp. at 949 ("[P]ost-merger Clorox took market share from Purex.")). Under *Brunswick*, as properly understood, this showing warranted judgment in favor of Purex. However, because of the District Court's misunderstanding of the law, Purex's demonstration that Clorox became further entrenched as a result of the acquisition was ignored by the court.

CONCLUSION

The decision below not only purports to overrule a decision of this Court, but it misconstrues this Court's latest word concerning the meaning of Section 7 of the Clayton Act. Thus, the lower court's action threatens, at once, this Court's role as the final arbiter in the federal judicial hierarchy as well as the proper interpretation and administration of the antitrust laws in this country. For these reasons and those set forth throughout this petition, a Writ of Certiorari should be granted to review the decision below.

Respectfully submitted,

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Appendix

APPENDIX A

No. 80-5304.

United States Court of Appeals,

Ninth Circuit.

PUREX CORP., Plaintiff-Appellant,

v.

PROCTER & GAMBLE CO. and Clorox Co., Defendants-Appellees.

Submitted April 8, 1981.

Decided Dec. 7, 1981.

Appeal from the United States District Court for the Central District of California.

Before CHOY and FLETCHER, Circuit Judges, and SOLOMON,* District Judge.

FLETCHER, Circuit Judge:

Purex appeals from the judgment entered by the district court in favor of Proctor & Gamble and Clorox (hereinafter appellees). We note jurisdiction under 28 U.S.C. § 1291 (1976). We affirm for the reasons set forth below.

I

INTRODUCTION[1]

Purex commenced this action in 1967, immediately after the Supreme Court affirmed the Federal Trade Commission's order requiring Procter & Gamble to divest itself of Clorox.

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1] The facts underlying Purex's antitrust claims are set forth in *Purex Corp. v. Procter & Gamble Corp.*, 419 F.Supp. 931 (C.D.Cal.1976); *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979) (*Purex I*). *See also Procter & Gamble*, 63 F.T.C. 1465 (1963); *Procter & Gamble Corp. v. FTC*, 358 F.2d 74 (6th Cir. 1966); *FTC v. Procter & Gamble Corp.*, 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967).

FTC v. Procter & Gamble, 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967). Purex alleged that it had been injured as a result of the acquisition of Clorox by Procter & Gamble in 1957. It sought monetary damages against appellees under section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), alleging violations of section 7 of the Clayton Act, 15 U.S.C. § 18 (1976), and sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1976).[2]

Both parties engaged in extensive discovery before trial.[3] After a lengthy bench trial,[4] the trial court entered judgment against Purex. *Purex v. Procter & Gamble*, 419 F.Supp. 931 (C.D.Cal.1976).

On appeal, this court reversed the district court's judgment, *Purex v. Procter & Gamble (Purex I)*, 596 F.2d 881, 883 (9th Cir. 1979), and remanded to provide the district court an opportunity to consider the impact of *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) and *Greyhound Computer Corp. v. IBM*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978).[5] We also requested the district court to separate its findings of fact and conclusions of law to facilitate appellate review. *Purex I*, 596 F.2d at 885, 889, 890. Finally, we did not foreclose the district court from hearing additional evidence on some of the issues in the case. *Id.* at 888-89 n.7; *id.* at 891 (Enright, J., concurring).

At a conference called by the trial court following the remand it indicated that it had reviewed the cases referred to in our decision and was of the opinion that they did not affect its original decision. It requested counsel for Procter & Gamble to prepare findings of fact and conclusions of law, and suggested that Purex submit its written objections to the findings and

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[2] Purex did not appeal the district court's judgment in favor of Appellees on the Sherman Act section 1 claim. *Purex I*, 596 F.2d at 883 n.1.

[3] Purex originally sought a jury trial. It agreed to waive its jury trial demand on the condition that Judge Gray try the case.

[4] The trial generated 5400 pages of transcript and 4500 exhibits were introduced.

[5] Both *Brunswick* and *Greyhound* were decided after the district court entered judgment against Purex, but before the case was submitted to this court.

conclusions submitted by Procter & Gamble. Purex agreed to this procedure. However, at the same time that Purex submitted its objections to Procter & Gamble's proposed findings and conclusions, it also moved to reopen the record to submit additional evidence.

The trial court, after making minor modifications, adopted the findings and conclusions submitted by Procter & Gamble. It stated that it had reviewed both parties' submissions, and that the findings and conclusions were its own irrespective of the source of their initial drafting. In its memorandum of decision, the trial court discussed the decisions cited to it by this court, as well as this court's more recent decision in *California Computer Corp. v. IBM*, 613 F.2d 727 (9th Cir. 1979). The court again concluded that there had been no antitrust violations and that, in any event, Purex's alleged injuries had not resulted from the merger. Finally, it denied Purex's motion to submit additional evidence because the evidence Purex sought to submit would have been relevant to issues litigated in the original trial and could have been submitted at that time.

Purex appeals, arguing that the district court did not follow this court's mandate in making its findings and conclusions,[6] and that the district court abused its discretion in denying Purex's motion to submit new evidence.

II

PUREX'S ANTITRUST INJURY

We stated in *Purex I*, that

> [e]ven if Procter's acquisition of Clorox had anti-competitive consequences, Purex cannot recover under section 4 unless it established that it suffered injury from the acquisition's anti-competitive effects.

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[6] Although Purex has phrased the question for review as whether the district court, on remand, in making its findings and conclusions adhered to the mandate, our reading of the district court's memorandum of decision convinces us that the court did exactly what we requested. We therefore treat Purex's appeal as challenging the specific findings of fact and conclusions of law made by the district court.

596 F.2d at 889. Because the district court in *Purex I* failed to separate its findings and conclusions, we could not be certain that the court had adequate factual support in the record from which it could conclude that Purex had suffered no antitrust injury as a result of the merger. *Id.* On remand the district court again explicitly concluded that the evidence failed to show that the alleged anti-competitive effects of the merger "were the cause of the injuries for which plaintiff seeks damages in this action." This conclusion is now supported by extensive findings. On this second review, our task is to determine whether the district court's findings are supported by the record.

The district court's findings of fact are reviewed under the clearly erroneous standard. Fed.R.Civ.P. 52(a); *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 989 (9th Cir. 1980).[7] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *Arrington v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 651 F.2d 615, 619 (9th Cir. 1981). Applying this standard to the findings relating to antitrust injury, we are not convinced that a mistake has been made.

Purex sought to establish that as a result of the Procter & Gamble-Clorox merger: (1) its share of the liquid bleach

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[7] Purex argues that the district court's findings do not deserve much weight because the district court merely adopted appellees' submissions with minor modifications. We have frequently criticized the wholesale adoption of the prevailing party's submitted findings by the trial court, and we do engage in a more careful scrutiny of those findings than we would had they been prepared by the district judge. *See, e.g., Hagans v. Andrus*, 651 F.2d 622, 626 (9th Cir. 1981); *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981). Here, however, the district court did not mechanically adopt the proposed findings but, from all indications, carefully reviewed them. *See Photo Electronics Corp. v. England*, 581 F.2d 772, 777 n.5 (9th Cir. 1978). Moreover, as Purex acknowledges, most of the proposed findings were taken from the district judge's original opinion. There is no suggestion that the original opinion was other than his own. Finally, we note that even though we carefully scrutinize the record, we still apply the clearly erroneous standard to the district court's findings. *Hagans*, 651 F.2d at 626; *Photo Electronics*, 581 F.2d at 777.

market declined; and (2) it was deterred from expanding geographically. The district court found, however, that Purex's declining market share resulted from its own policy choices and that these policy choices had not been made because of the merger.[8] The district court also found that Purex's expansion plans were in no way affected by the merger but again resulted from internal policy choices made by Purex management.[9]

Much of the evidence submitted in this case was conflicting. As only one example, Purex's chief executive testified that Clorox's response to Purex's attempt to market its liquid bleach in Erie, Pennsylvania taught him that Purex could not hope to compete with post-merger Clorox on a national basis. However, other Purex documents introduced into evidence suggested that Purex was satisfied with the initial response it received in Erie, and chose to withdraw because of distribution problems. The district judge found the contemporaneous documents persuasive, and accordingly discounted the testimony of Purex's chief executive. Such choices are for the fact-finder, not the reviewing court. After reviewing the record, we are persuaded the district court was not clearly erroneous in its findings that support its holding that Purex did not suffer antitrust injury.[10]

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[8] Among the specific policy choices the district court found Purex had made, which affected its share of the liquid bleach market, were the following: (1) a product diversification program; (2) the introduction of "dry bleach" into the market; and (3) the manufacturing of high quality liquid bleach for sale by chain stores under private labels. *See generally*, *Purex*, 419 F.Supp. at 943-45. The district court further found that although Purex's share of the liquid bleach market declined, its profits showed a steady increase during the period in question.

Notwithstanding the choices made by Purex's management, Purex could have recovered damages under section 4 if it proved that at least part of its inferior market position was attributable to the claimed section 7 violations. *Purex I*, 596 F.2d at 889. The district court found on the question of causation however that Purex failed to sustain its burden of proving that its inferior market position was the result of anything but its policy choices.

[9] The district court found that Purex chose not to expand geographically primarily because it chose to invest in other enterprises.

[10] The district court in all made 185 specific findings of fact.

Accordingly, we affirm the district court's conclusion that Purex cannot recover damages under section 4 of the Clayton Act.[11]

III

DENIAL OF PUREX'S MOTION

The district court denied Purex's motion to reopen the record on the ground that the evidence Purex sought to introduce could have been introduced at the original trial. Purex argues that this is inconsistent with our opinion in *Purex I* where we advised the district court that it could reopen the record. Purex reads the prior opinion too expansively.

We reversed in *Purex I* to permit the district court to consider two cases that came down after it had decided *Purex I* and to separate its findings of fact and conclusions of law so that on further review the appellate court could determine whether the conclusions of law were supported by adequate findings. Our suggestion that the district court was not foreclosed from hearing additional evidence on remand, *Purex I*, 596 F.2d at 888-89 n.7, was made in the context of our conclusion that the Supreme Court decision in *Brunswick* required specific findings by the district court as to whether the merger "produced anti-competitive effects or inspired anti-competitive conduct." *Id.* at 888. We feared that because *Brunswick* was decided after the original trial the record might be insufficiently developed for the district court to make specific findings on these points. We did not, however, mandate reopening, but left a decision as to the need for reopening to the sound discretion of the district court. *See Skehan v. Board of Trustees*, 590 F.2d 470, 478 (3d Cir. 1978), *cert. denied*, 444 U.S. 832, 100 S.Ct. 61, 62 L.Ed.2d 41 (1979).

[11] Because we hold that the district court's conclusion of law that Purex did not suffer antitrust injuries is supported by its specific findings on that issue, we need not consider whether the district court's conclusion that Procter & Gamble and Clorox did not commit any antitrust violations is also correct.

The district judge concluded that the record was sufficiently developed to permit the specific findings required by *Brunswick*. He therefore declined to reopen the record to admit evidence that had been available at trial. *See generally Zenith Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 332-33, 91 S.Ct. 795, 803, 28 L.Ed.2d 77 (1971); *Thomas v. S.S. Santa Mercedes*, 572 F.2d 1331, 1336 (9th Cir. 1978); *Locklin v. Switzer Bros., Inc.*, 299 F.2d 160, 169 (9th Cir.), *cert. denied*, 369 U.S. 861, 82 S.Ct. 950, 8 L.Ed.2d 18 (1962). Our scope of review of this decision is quite limited. 6A *Moore's Federal Practice* ¶ 59.04[13] at 59-36 (2d ed. 1979); *see Skehan*, 590 F.2d at 478. We find no abuse of discretion.[12]

IV

CONCLUSION

We conclude that the district court was not clearly erroneous in denying damages to Purex on the basis that Purex did not prove that it was injured as a result of the alleged antitrust violations. We further conclude that the district court did not abuse its discretion in declining to reopen the record for additional evidence.

AFFIRMED.

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[12] In the initial trial Purex had the burden to prove injury caused by the defendants' antitrust violations. Neither *Brunswick* nor this court's decision in *Purex I* changed that. There is no reason to reopen to allow Purex to attempt to prove what it should have but failed to prove the first time.

APPENDIX B

CIVIL NO. 67-1546-WPG

United States District Court
Central District of California

PUREX CORPORATION, LTD.,
a corporation,

Plaintiff,

v.

THE PROCTER & GAMBLE COMPANY,
a corporation, and THE CLOROX
COMPANY, a corporation,

Defendants.

MEMORANDUM OF DECISION
(filed March 17, 1980)

Following the remand from the Court of Appeals, announced in its opinion of May 11, 1979 (596 F. 2d. 881), this court has given careful consideration to that opinion and, as directed, has studied *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F. 2d 488 (9th Cir. 1977). I also have caused to be prepared detailed findings of fact and conclusions of law, in accordance with the mandate of the Court of Appeals. The findings and conclusions are in substantially the form submitted by the defendants pursuant to my direction at a hearing that was held in light of the remand. I have considered each finding in detail and have made minor modifications therein. I also have studied the extensive objections that the plaintiff has submitted with respect to such findings and, as a result, have made other minor changes. However, I could not accept most of the criticisms asserted by the plaintiff, because they stem from a view as to what the evidence at the trial established that is completely different

from mine. The findings and conclusions that are filed herewith are my own, irrespective of the source of their initial drafting.

As the findings and conclusions show, I believe that there is nothing in *Brunswick* or *Greyhound* that mandates, or even suggests, a different result than the one that I announced after the trial. As Justice Marshall stated in *Brunswick,* the plaintiff, in order to recover damages because of a Section 7 violation, must prove injuries that stem from "... the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 429 U.S. at 489. Neither of these results occurred here, and I very much regret that the opinion that accompanied my initial judgment for the defendant (419 F. Supp. 931) was so inartistically drawn as to fail to make this glaring fact clear enough to be understood.

There were no anticompetitive acts that were made possible by the violation. Clorox showed a better record than did Purex in the marketing of branded liquid bleach before the merger, because it devoted more attention, initiative, and advertising to that product than did Purex. In other words, Clorox simply did a better job, and the results showed it. The same comparative conduct and the same comparative results occurred during the years of the merger. The "deep pockets" of Procter were not used to any significant extent to continue this same ascendancy of Clorox over Purex.

The acts committed by Clorox before the merger were not anticompetitive, and nothing was done by Clorox after the merger that it did not do or could not have done before just as effectively. It necessarily follows from this finding that no anticompetitive *acts* took place that were *made possible* by the merger. This conclusion, of itself, disposes of the second alternative showing that the plaintiff must make under *Brunswick.*

The first alternative test under *Brunswick* is whether or not there were anticompetitive *effects* of the section 7 violation that damaged the plaintiff, apart from "anticompetitive acts" made possible by the violation. Such effects must pertain to the subjective concern that might have discouraged Purex from

aggressively competing with Clorox for fear of the retaliation that the latter could bring to bear, having been made much stronger as a result of the merger. Here again, this circumstance did not occur, as I tried to state in my earlier opinion.

The conclusion that I drew, and still draw, from the record is that Purex was not afraid of Clorox after the merger. The actions that it took or did not take with respect to the exploitation of its branded liquid bleach stemmed from its corporate policies that were unrelated to the merger. Some of these policies tended to reduce the impetus given to the branded bleach, in order to enhance profits derived from its other products. This does not imply that such policies were unwise, because the overall profits that Purex earned increased substantially during all of the years here concerned.

However, these policies played a major part in the failure of Purex to capture and hold the much larger share of the branded bleach market that it could have accomplished if it had elected to compete more vigorously with Clorox, both before and after the acquisition. Once again, fear of the "deep pockets" had nothing to do with this at the time. Such fear was discovered much later and was inspired by the Section 7 proceedings instituted by the Federal Trade Commission.

With respect to the alleged Section 2 violations, Judge Hufstedler, in her opinion ordering the remand, reminded us that "a plaintiff must establish: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.' (*United States v. Grinnell Corp.* (1966) 384 U.S. 563, 570-71, 86 S.Ct. 1968, 1704, 16 L.Ed.2d 778.)" (596 F.2d at 890.) This obligation was further described in the later decision of *California Computer Products, Inc. v. International Business Machines Corp.*, ____ F.2d ____ (9th Cir. June 21, 1979):

> "The plaintiff need now [*sic*] show that the conceded monopolist's acts were of a kind that would be unlawful for an ordinary enterprise. *Greyhound*

> *Computer Corp. v. IBM*, 559 F.2d at 498. Rather, the plaintiff must show that the defendant's acts 'unnecessarily excluded competition' from the relevant market. *Id.* . . . . [T]he test is whether the defendant's acts, otherwise lawful, were *unreasonably* restrictive of competition." *Id.* (Emphasis original; footnote omitted.)

Here again, such conduct did not occur, even if it be assumed that the market share of post-acquisition Clorox approached monopolistic proportions. Clorox did not " 'exclude competition' from the relevant market," nor were its acts otherwise "unreasonably restrictive of competition."

Of course, the evidence with respect to all of these matters was conflicting, but I believe that the facts are in general harmony with the findings and conclusions that accompany this memorandum.

This court is convinced that neither the antitrust laws nor principles of fairness can justify rewarding Purex by giving it in damages treble the amounts that it might have made from its branded bleach had it elected to try a bit harder in its competition with Clorox, whether before or after the acquisition. Such election was not governed or substantially influenced by anything that Clorox did or anything that Purex feared that post-merger Clorox might do.

The foregoing portions of this memorandum were prepared before any consideration was given to the plaintiff's Application To Reopen Record For Purpose Of Taking Additional Evidence, which was filed on November 7, 1979. Such application must be denied.

All of the matters upon which the plaintiff proposes to offer additional evidence were issues that were thoroughly litigated, argued and considered at the trial. Now that the court has announced factual conclusions contrary to those sought by the plaintiff, the plaintiff would like to have another try at buttressing its position. The presentation of evidence almost always involves matters of selection. After an adverse decision is

received, it is a natural reaction to conclude that additional witnesses and exhibits would have made a difference.

This court declines to speculate upon whether the testimony of Mr. Tincher and Mr. Evans and the introduction of additional exhibits would have brought about factual findings more favorable to the plaintiff. However, there appears to be no reason why such evidence could not have been presented in the first instance. Accordingly, I can find no justification for, in effect, granting a new trial on the issues that the plaintiff now seeks to litigate a second time.

Accordingly, judgment for the defendants is, once again, being filed contemporaneously herewith.

DATED: March 14, 1980.

/s/ WILLIAM P. GRAY

WILLIAM P. GRAY
United States District Judge

APPENDIX C

CIVIL NO. 67-1546-WPG

United States District Court
Central District of California

PUREX CORPORATION, LTD.,
a corporation,

Plaintiff,

v.

THE PROCTER & GAMBLE COMPANY,
a corporation, and THE CLOROX
COMPANY, a corporation,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (filed March 17, 1980)

FINDINGS OF FACT

I. THE PARTIES AND THE BLEACH MARKET

1. The Procter & Gamble Company ("Procter") is a large and nationally well known manufacturer of soaps, detergents and other high-turnover household products sold principally through grocery stores. (419 F. Supp. at 933.)

2. Household liquid bleach is a solution of sodium hypochlorite in water used for whitening laundry, removing stains, disinfecting, and deodorizing. Household liquid bleach constitutes a distinct line of commerce and is a product with no close substitutes.

3. As of 1957, Clorox Chemical Company was the nation's leading manufacturer of household liquid bleach, accounting for about 49 percent of the total dollar sales of that product in the United States, with annual sales of almost $40 million.

(419 F. Supp. at 933.) At all relevant times, liquid bleach was Clorox's only product and Clorox sold household liquid bleach only under the "Clorox" label.

4. Purex, the present plaintiff, in 1957 accounted for 15.7 percent of the total sales of liquid bleach in the United States. (419 F. Supp. at 933.) Virtually all of these sales were made in the western two-thirds of the United States, which Purex called the "PDA," for the "Purex Distribution Area."

5. Well before Procter's acquisition of Clorox, Purex's management had concluded that household liquid bleach was a product with limited growth potential, and had decided to use profits from the Purex brand of bleach to subsidize the development, marketing and advertising of other Purex products. From 1945, when "Purex" brand bleach was Purex's only important product, to 1957, Purex grew to have thirteen products. Purex had total corporate sales in fiscal 1957 of about $50 million, of which 28 percent were of "Purex" brand household liquid bleach. Between then and 1967, Purex's corporate sales grew to $192 million and its pretax profits quintupled.

6. In 1946, the sales of Purex brand household liquid bleach far exceeded the sales of Clorox bleach in the PDA. As normal market conditions returned following World War II, and as it followed its diversification policy, Purex's lead steadily diminished and by 1953 Clorox was outselling Purex brand bleach in the PDA.

7. Clorox's unit sales of liquid bleach, computed on a unit sale basis, represented about 42 percent of the total volume of liquid bleach sold nationally during the year ending June 30, 1953, about 45 percent during the year ending June 30, 1957, and about 53 percent during the year ending June 30, 1967.

8. "Purex Liquid Bleach" was plaintiff's principal bleach brand. Sales of this brand alone represented about 17 percent of the total volume of liquid bleach sold nationally during the year ending June 30, 1953, about 15 percent during the year ending June 30, 1957, and about 13 percent during the year ending June 30, 1967.

9. Liquid bleach sold under the private labels of retail stores represented about 7 percent of total liquid bleach volume in the United States in 1960 (the first year for which separate figures are available) and about 20 percent in 1967. Clorox manufactured no private label bleach. Plaintiff was among the nation's principal suppliers of liquid bleach under private labels of retail stores (*cf.* 419 F. Supp. at 945) and sold certain other brands as well.

10. In the Pacific region (which includes California, Utah, Oregon, Arizona, Nevada, Idaho and Washington), Clorox's share of the total volume of liquid bleach sales was about 36 percent in 1953, 37 percent in 1957 and 38 percent in 1967. The share represented by Purex brand of liquid bleach was about 49 percent in 1953, 42 percent in 1957 and 28 percent in 1967. The share of private label and all other brands combined was about 15 percent in 1953, 21 percent in 1957 and 34 percent in 1967.

11. In the southwest region (which includes Arkansas, Louisiana, New Mexico, Texas and Oklahoma), Clorox's share of the total volume of liquid bleach sales was about 46 percent in 1953, 48 percent in 1957 and 51 percent in 1967. The share represented by Purex brand liquid bleach was about 42 percent in 1953, 39 percent in 1957 and 28 percent in 1967. The combined share of private label and all other brands was about 12 percent in 1953, 14 percent in 1957 and 21 percent in 1967.

12. Much of the increase in market share enjoyed by private label in the PDA between 1957 and 1967 consisted of bleach manufactured by plaintiff.

13. During 1957-1967, in certain Eastern regions where Purex brand bleach was not sold until late in the period of acquisition, Clorox's shares of total liquid bleach sales ranged from 45 to 75 percent. (Exhibits IF through IX.) In the bulk of those markets, Clorox's share ranged between 60 and 70 percent.

14. The relevant geographic market for household liquid bleach is a national market and a series of regional markets. (386 U.S. at 571; 63 F.T.C. at 1561.)

II. THE ACQUISITION

15. On August 1, 1957, Procter acquired the assets of the Clorox Chemical Company by transfer of those assets to Procter's wholly-owned subsidiary, defendant Clorox Company. (419 F. Supp. at 933.)

16. On September 30, 1957, the Federal Trade Commission instituted proceedings which challenged the acquisition as violating Section 7 of the Clayton Act. On November 26, 1963, the Commission ruled that the effect of the acquisition "may be substantially to lessen competition or to tend to create a monopoly," and ordered that Procter divest itself of Clorox (63 F.T.C. 1465). On April 11, 1967, the Supreme Court affirmed the Commission order (386 U.S. 568), and the divestiture was completed on January 2, 1969. Purex filed this action against Procter and Clorox on October 23, 1967, under Section 4 of the Clayton Act, seeking damages for alleged violations of the antitrust laws. (419 F. Supp. at 933.)

17. The acquisition was held unlawful because the following anticompetitive consequences were apprehended: "(1) the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing; (2) the acquisition eliminates the potential competition of the acquiring firm." (386 U.S. at 578.)

18. The principal reasons for apprehending these consequences included the following:

(a) Clorox might receive volume discounts on advertising because of its association with Procter, and this could give Clorox a cost advantage over new entrants and existing competitors (63 F.T.C. at 1563-64);

(b) Clorox might participate in Procter's sponsorship of network television advertising (*id.* at 1564);

(c) Clorox might gain advantages over competitors by having joint promotions and joint advertising with Procter products (*id.* at 1565);

(d) Clorox might discontinue its network of independent brokers and instead have its product distributed by Procter's direct sales force, with resulting promotional advantages for Clorox (*id.*);

(e) Procter might induce retailers to give Clorox favored shelf space or other especially advantageous terms involved in the retail selling of bleach (*id.* at 1566);

(f) Procter's size and financial resources might permit Clorox to engage in short term or local price-cutting, or even in systematic below-cost selling, to the injury of its competitors or new entrants (*id.* at 1567);

(g) Procter's reputation and marketing experience might discourage firms from aggressively competing with Clorox (*id.* at 1567-68);

(h) Procter might use Clorox bleach as a tying product, loss leader or cross-coupon offering in promoting other Procter products (*id.* at 1576);

(i) The elimination of Procter as a potential competitor of Clorox removed a tangible influence on independent Clorox's policies and prices and removed a factor that tended to enhance competition in pricing and other policies (*id.* at 1577-78);

(j) The liquid bleach industry might become less competitive on price and other factors (*id.* at 1549-56, 1577-78; 386 U.S. at 578);

(k) Procter's size and financial resources would enable it to utilize wide-scale sales promotion techniques on behalf of Clorox. As a single-product firm in the industry, pre-merger Clorox would have been unable to afford such sales promotion (63 F.T.C. at 1566);

(l) The substitution of Procter for Clorox would increase the scale of optimally efficient operation in the bleach industry. Only very large firms, firms on the scale of Procter itself, would be able to compete on roughly equal terms in the industry. Entry barriers would be heightened and, concomitantly, the power of market leaders to dominate their smaller rivals would be enhanced (*id.* at 1568);

(m) The merger further rigidified an already oligopolistic industry (*id.* at 1575);

(n) Procter's acquisition of Clorox, by strengthening Procter's aggregate market position, might lead to an impairment of competition in many industries besides liquid bleach (*id.* at 1576).

III. EFFECTS OF THE ACQUISITION ON COMPETITION IN THE BLEACH MARKET

A. *Pre-Acquisition Clorox*

19. In 1946, Clorox sold its liquid bleach throughout the nation.

20. Pre-acquisition Clorox had its headquarters in Oakland, California. (419 F. Supp. at 935.)

21. Pre-acquisition Clorox financed sales promotions and advertising out of the revenues earned on the sales of liquid bleach. (419 F. Supp. at 934, 936.)

22. As an independent company, Clorox could and did obtain competent management personnel. Clorox also had available from sources that likewise were available to Purex and others (and were used by Clorox and Purex) a variety of technical services in the areas of market research, media studies for advertising, package and label design, product development, engineering assistance and other such services. (419 F. Supp. at 935.)

23. Pre-acquisition Clorox distributed its product to retailers by means of a network of independent brokers. This was supervised by a Clorox official, Bernard Trimpe. (419 F. Supp. at 935.)

24. Pre-acquisition Clorox as a competitor did not have a passive and benign "live and let live" attitude. (419 F. Supp. at 936.) It competed in the liquid bleach market more aggressively and effectively than did Purex.

25. Pre-acquisition Clorox regularly spent significant amounts on advertising (including "spot" television) and marketing, and devoted all of its efforts to the sale of its brand of liquid bleach.

26. Pre-acquisition Clorox regularly did a better job in marketing liquid bleach than did Purex, and the same trend continued after the merger. (419 F. Supp. at 934, 936.)

B. *Clorox As An Independent Operation After The Acquisition*

27. The attitude of Procter toward Clorox at the time of the merger was that Clorox had been remarkably successful, having grown as rapidly as Procter; and that it should be permitted to continue to operate as a separate entity in substantially the same manner as before. This attitude was generally adhered to throughout the period of acquisition. (419 F. Supp. at 935.) As the FTC noted on the basis of evidence covering the first four years after the acquisition, Procter "carefully refrained from changing the nature of the Clorox operation" in part because of a "general Procter policy of moving slowly and cautiously in a new field." (63 F.T.C. at 1583-84.)

28. From September 1957, through April 1967, the acquisition was continually under scrutiny in the proceeding before the Federal Trade Commission and in related appellate proceedings in the courts. From April 1967 until January 1969, Procter was under a final order to divest itself of Clorox, which was accomplished on January 2, 1969. (419 F. Supp. at 933.)

29. Clorox's basic policies remained the same after the acquisition and were not changed by Procter. Clorox was little different after the acquisition than it was before, apart from increased expertise in some areas. (419 F. Supp. at 935.)

30. Clorox operated in largely the same manner after the acquisition as it had before, and the vast resources of Procter were not used to give Clorox capabilities that previously were unavailable to it. (419 F. Supp. at 936.)

31. After the acquisition, Clorox did not suddenly become more aggressive or fight more vigorously to increase its share of the liquid bleach market at the expense of Purex. There was no such change in attitude and practice as a result of the merger. (419 F. Supp. at 936.)

32. The acquisition did not mark a substantial change in the competitive relationship between Purex and Clorox. The same competitive relationships that had existed between Purex and Clorox over the years before the merger continued afterwards. (419 F. Supp. at 934, 936.)

C. *Procter Personnel*

33. Clorox was administered by its own personnel after the acquisition, in much the same manner as before. (419 F. Supp. at 935.) Most positions continued to be filled by persons who had worked for the old Clorox Company.

34. As soon as Procter gained control, one of its senior executives, Fred Brown, was designated to take charge of Clorox as executive vice-president. He moved to Oakland, California, and he brought with him two principal assistants who also had come up through the ranks at Procter. Over the years, Clorox hired several other employees from Procter to fill assignments for which their well-established skills uniquely qualified them. (419 F. Supp. at 935.)

35. Procter management traditionally has been considered to be very enlightened in the field of manufacturing and marketing household products. Mr. Brown and his associates that came from Procter doubtless had acquired valuable expertise in the course of their years with that company, and they served Clorox very well. However, there were other sources from which Clorox could have obtained thoroughly competent management personnel. (419 F. Supp. at 935.)

36. Mr. Howard Morgens, then the chief executive officer of Procter, also had the title of president of Clorox. Mr. Brown was in frequent contact with Mr. Morgens to keep the latter informed as to what Clorox was doing, and in the course of the years, some advice and direction were given and some restrictions imposed. (419 F. Supp. at 935.)

37. For the most part, local Clorox management was "given its head" and it was run as an independent operation. (419 F. Supp. at 935.) The occasional addition of Procter personnel to Clorox may have given Clorox expertise in some areas or made Clorox slightly more efficient but had no discernible effect on Clorox's activities or position in the market.

D. *Procter Services*

38. Procter had within its organization separate departments whose sole function was to discover and develop better ways of accomplishing the many aspects of producing and marketing its various products. These departments provided technical services in areas of market research, media studies for advertising, package and label design, product development, engineering assistance and others. (419 F. Supp. at 935.)

39. As a member of the Procter "family," Clorox was entitled to these services and did use them to some considerable extent. Clorox was charged for all such services. These charges and payments were limited to bookkeeping transactions, but they presumably reduced the profits of Clorox in the same manner as did other expenses, a fact that regularly was taken into account in determining whether to use a particular service. (419 F. Supp. at 935.) These services had only a minimal role in Clorox's total operations, representing less than one percent of its sales during 1957-1967.

40. Throughout the period of the merger comparable services were available for hire from sources unrelated to Procter and were used by Purex as well as by Clorox. The services that Procter afforded to Clorox doubtless were very good; that they were better than the services that were available to Purex and otherwise available to Clorox, or that their availability to or use by Clorox affected competition, was not shown by plaintiff's evidence. (*Cf.* 419 F. Supp. at 935.) In fact, after the acquisition Clorox continued to use outside advice and services for advertising, packaging, market research and the like.

41. The evidence did not show that Clorox's performance or conduct in the marketplace was affected in any material way by Clorox's access to the marketing services of Procter.

E. *Procter's Financial Resources*

42. Procter had large financial resources. These resources were not used to assist Clorox or against Clorox's competitors, such as by financing sales promotions "or in a price fight to the finish." (63 F.T.C. 1465, 1566-67.) Procter did not use its

"deep pockets" for the benefit of Clorox. Clorox's sales promotions and other marketing efforts were financed strictly out of proceeds earned by Clorox from the sales of liquid bleach. (419 F. Supp. at 934.)

43. Clorox utilized a uniform national list price and its prices were always equal to or above full cost, with a few localized and temporary exceptions. (Trial Tr. 4264; *cf.* 419 F. Supp. at 934.) In those limited situations, apart from Erie, Pennsylvania, which is considered separately, *infra*, where its accounting records reflected costs in excess of revenues, such differences were not attributable to price cutting or unusual promotional activity. The evidence showed that such differences were attributable to abnormally high shipping costs in areas remote from Clorox's plants, low sales volume, and accounting procedures which allocated certain national advertising expenditures to local areas on a basis unrelated to sales. These localized and temporary instances in which costs exceeded revenues were not shown to have had any effect on competition or to have caused injury to any other bleach firm. They did not reflect any enhanced capacity that Clorox derived from the acquisition. The prices were not shown to be below average variable or marginal costs and were not used for the purpose of meeting new entry. Plaintiff has made no claim that these localized and temporary instances in which revenues failed to meet costs were actionable or caused injury to the plaintiff.

44. During the period of Procter ownership, Clorox was always profitable, nationally and in every regional area, and none of its activities was dependent upon financial help from Procter. The money flow was entirely the other way, as Clorox continuously paid dividends from its profits to the parent company. (*Cf.* 419 F. Supp. at 934.) All of Clorox's activities were financed solely by Clorox's own revenues.

F. *Potential For Joint Marketing Of Procter Products With Clorox Bleach*

45. The decision of the Federal Trade Commission set forth a variety of ways in which Clorox's marketing efforts might have been advantaged by joinder with Procter's efforts.

(See Finding 18, *supra*.) The evidence in this case showed that none of the potential joint marketing efforts apprehended by the FTC were engaged in by Clorox during the merger period.

46. Procter did not use its own direct sales force in the marketing of Clorox liquid bleach. Clorox used its pre-existing network of independent brokers after the merger and this system remained under the direct control of the same Clorox official, Bernard Trimpe. (419 F. Supp. at 935.)

47. There was no joint advertising of Clorox bleach and other Procter products.

48. There were no combined shipments of Clorox bleach and other Procter products.

49. Clorox did not participate in Procter network television advertising.

50. Retailers were not induced to give Clorox preferred shelf space because of Procter's ownership of Clorox.

51. Clorox bleach was not used as a tying product, loss leader, or cross-coupon offering or in any other joint promotion or sales effort with other Procter products. (*Cf.* 419 F. Supp. at 949.)

G. *Media Discounts*

52. Clorox used local "spot" commercials for its television advertising program. Each station had a list price and published discounts that depended on the total number of spots an advertiser purchased in a given time period. Local stations were in addition willing to negotiate "off-card" discounts that were not included in the published discounts.

53. After its merger with Procter, Clorox was charged the published rate that resulted from the combined total number of Clorox and Procter spots on a station during the relevant time period, and this was at times lower than the published rate that Clorox, on its own, would have paid. Clorox, as a part of Procter, was accordingly granted larger spot discounts than would have been available to Clorox alone. (419 F. Supp. at 936.) (Clorox did not use network television, which gave rise to the discounts that were the concern of the FTC, 63 F.T.C. at

1563-64.) However, policies of Procter precluded Clorox from negotiating for additional "off-card" discounts that it could otherwise have obtained as an independent company. Although these two offsetting circumstances doubtless resulted in a net gain to Clorox, the record does not show its extent. (*Cf.* 419 F. Supp. at 936.)

54. It is in any event plain that any cost advantage accruing to Clorox in its purchases of spot television advertising was minimal in relation to Clorox's sales and profits. Clorox on its own had ample funds with which to pay for the advertising that it chose to purchase, irrespective of the discounts, and the evidence does not show that Clorox advertised more as a result of the discounts. (419 F. Supp. at 936.)

55. Purex received substantial discounts, and, unlike Clorox after the merger, Purex sought and received special "off-card" discounts. The discount rates earned by Clorox had no impact upon the nature or the quantity of the advertising program envisaged, adopted or maintained by Purex. (419 F. Supp. at 936.)

56. Clorox also received discounts on magazine advertising. These discounts were relatively modest; even plaintiff estimated that they saved Clorox but a total of $1.6 million during 1957-1967. (Exhibit 2414.)

57. After the acquisition, Clorox steadily reduced its marketing expenditures as a percentage of sales and on a per case basis. The amounts of these reductions exceeded any possible savings from the Procter discounts. The advertising discounts did not influence the type or amount of advertising purchased by Clorox. Instead, any savings achieved from the discounts were simply reflected in Clorox's profits. There is no evidence that the availability or use of these discounts affected competition in any fashion. (*Cf.* 419 F. Supp. at 936.)

H. *Effects on Competition*

1. *Entry Barriers*

58. The claim of Purex that its national expansion plans were frustrated by its fear of post-merger Clorox is an afterthought induced by the contemplation of this litigation. (419 F. Supp. at 945.)

59. The evidence showed that there were more new entries after the acquisition than before. The record disclosed no new entry during 1945-1957. After 1957, Purex achieved major expansions into the Southeast and Northeast in 1966-1967, and there was enormous growth by private label sellers and new entries by various smaller bleach firms.

60. In October 1957, Purex undertook to sell its liquid bleach in Erie, Pennsylvania, where Purex had not previously been operating and where Clorox enjoyed a substantial market share. (419 F. Supp. at 940.) This effort principally was part of a four-city test of consumer willingness to pay a premium price for a bleach formulation that produced nonfunctional foam packaged in a bottle with a new "coffee-pot" handle. It also may have been watched as being relevant to Purex's ability to expand into Eastern markets. Purex initially achieved almost complete distribution for its product among the stores of Erie and a market share in Erie of more than 30 percent, which soon went down to about 10 percent and remained at approximately that level until Purex withdrew from the area in about March 1959. (419 F. Supp. at 940.) (See also, Findings 90 to 98, *infra.*)

61. Purex officials did not consider the Clorox response to their entry in Erie to be inordinately strong at the time it occurred, and there was no creditable evidence that such response had anything to do with the 1959 decision to withdraw. Several documents from Purex files discuss the Erie experience. The general conclusions were that for Purex to have gained and held a 10 percent share of the market was a satisfactory accomplishment, particularly in view of the fact that the innovations of a new bottle with a "coffee-pot" handle and the "foaming" characteristic of the bleach that Purex had sought there to introduce did not prove popular enough to justify the increase in prices that accompanied them. (419 F. Supp. at 941.)

62. The principal reasons for Purex's withdrawal from the Erie market are set forth in a memorandum of a Purex Marketing Strategy Committee meeting on February 5, 1959, which states that "... it was agreed that we should withdraw

from the Erie Test Market on Liquid Bleach because of the problems associated with drop shipping the stores in this area which over an extended period of time results in dissatisfaction on the part of the Trade with this method of handling." (Exhibit 1640.) (*Cf.* 419 F. Supp. at 941.)

63. The evidence did not show that the merger inhibited Purex from "aggressively competing" by entering new markets. Purex's experience in Erie, coupled with Purex management's knowledge of Procter's immense market power, did not lead Purex to conclude that it could not expand. (*Cf.* 419 F. Supp. at 946.)

64. The contemporaneous actions and documents of Purex give no sign of all-pervading fear of post-merger Clorox that plaintiff claims to have frustrated the Purex expansion plans. (419 F. Supp. at 946.) The evidence does not show that Purex regarded the Erie episode or the acquisition as raising new barriers to entry.

65. Mr. A. C. Stoneman, who was chief executive officer of Purex in 1958 and for several years before and after, testified that the experience in Erie taught him that Purex could not hope to compete with Clorox on a national basis. But if that was his attitude then, he kept it to himself. Neither he nor anyone else in the Purex management gave any contemporaneous indication of having been given any such traumatic lesson. (419 F. Supp. at 946.) The court is unable to accept Mr. Stoneman's testimony about the "lesson" of Erie.

66. In August 1958, within six months after the experience in Erie, Mr. Stoneman began negotiation for the purchase of the John Puhl Division of Sterling Drug, Inc. The John Puhl Division was the fourth largest manufacturer of liquid bleach in the country and had plants in Illinois, Ohio and Virginia. In a memorandum written after Procter's acquisition of Clorox and Purex's entry into Erie, Mr. Stoneman "explained" to the owner of Puhl that "we were still interested in expanding our liquid bleach business from our area position to a national one;" and that ". . . we were interested in investigating the possibility of purchasing a position in markets where we did not now

distribute liquid bleach prior to making plans for expansion by other means." (Exhibit BT.) (*Cf.* 419 F. Supp. at 946.)

67. One month later, Purex's Vice-President Davidson submitted to Mr. Stoneman a memorandum that recommended the acquisition of the John Puhl Division "... as the most feasible step toward nationalizing Purex liquid bleach by expansion into non-Purex areas." (Exhibit CF, page 5.) The acquisition was made in October 1958, for a price of $4 million. One year earlier the asking price had been $3 million, which Mr. Stoneman then thought "sounds high." Such a transaction and the expressed reasons for it do not indicate a company that has been intimidated by the implied threats of its larger rival so that it is afraid to advance into new areas. (419 F. Supp. at 946.) Further, if the acquisition had made the bleach business unattractive for small companies, the price for Puhl would not have increased so dramatically. If anything, the increased price paid for the John Puhl property after Procter's acquisition of Clorox tends to reflect improved prospects for smaller bleach producers, thus increasing the value of their business, and did not raise entry barriers.

68. The evidence did not show that the Erie experience, or the acquisition, or any actions caused by the acquisition, foreclosed the possibility of expansion by internal growth by Purex or any other bleach producer, or rendered such expansion economically impracticable, or made expansion by acquisition more costly than by internal growth.

69. In 1966-1967, Purex planned and executed significant new market entries in the Southeast and the Northeast. (419 F. Supp. at 947.) Those plans disclosed no fear or concern resulting from Procter's ownership of Clorox.

70. The record shows that during this entire period between 1957 and 1967, the Purex executives and the salesmen in the field wrote many communications concerning the hopes, problems, triumphs and frustrations that were experienced in contemplating, planning and carrying out the program of eastern expansion. There are frequent references to Clorox, sometimes as a major competitor, and sometimes as not having

been as formidable as had been anticipated. But nowhere in the record in those years is there any suggestion that Purex should not expand because Clorox was now under Procter ownership. (419 F. Supp. at 947.)

71. The timing and the manner in which Purex entered new markets were dictated by its own strategy as to what would best enhance the progress of the company, and fear of Procter/Clorox played no significant part in these decisions. Plaintiff's claims in this litigation that Procter's acquisition of Clorox deterred it from expanding the distribution of Purex brand bleach cannot be credited. (*Cf.* 419 F. Supp. at 947-948.)

2. *Competition From Smaller Firms*

72. Clorox operated in largely the same manner after the merger as it did before, and engaged in vigorous but fair competition after the merger in the same manner as before. (419 F. Supp. at 934-36, 949.) The vast resources of Procter were not used to give Clorox capabilities that previously were unavailable to it. Anything that Clorox did after the merger it had the full capability to do before and could have done had there been no acquisition. (*Id.* at 934-35.)

73. Purex had no fear of retaliation by Procter-owned Clorox. A statement made by Mr. Stoneman at the time of the acquisition clearly reveals Purex's confidence that it could successfully compete with Procter-owned Clorox. (Exhibit BI.) Purex did not become more cautious in competing with Clorox due to fear of retaliation by Procter. (419 F. Supp. at 947.) Purex in fact successfully increased its liquid bleach business. While Procter owned Clorox, the sales of Purex brand bleach increased more rapidly than during the prior decade, when Clorox was an independent company. From 1957 to 1967 sales of Purex brand liquid bleach increased from 8.2 million to 13.7 million cases, and Purex's total sales of bleach increased from 8.8 million cases to 17.7 million cases. These data include 2.6 million cases of Purex brand, and 1.6 million cases of other brands of household liquid bleach that Purex sold outside the PDA in 1968—an area in which it was selling only nominal amounts of bleach in 1957.

74. Throughout the period of the merger many smaller brands competed successfully with Clorox in their respective local regions. (419 F. Supp. at 949.) In addition, sellers of bleach under private labels significantly increased their market share, and in some areas grew faster than Clorox. (*Id.*) Further, total liquid bleach sales increased by about 70 percent between 1957 and 1967, and Purex, Clorox and private label brands all shared in this growth. (Exhibit JI.)

75. The evidence did not show a decrease in the vigor of competition in the liquid bleach market after 1957. For example, on two occasions in the 1960's, intense competition from private label bleaches forced Clorox to lower its list prices across the country. Clorox did not seek, and was not able, to exercise price leadership in the liquid bleach market. The record showed continuing competition in the form of lower prices, discounts, advertising, sales promotions, packaging innovations, a new product formula introduced by Purex, and a variety of other forms of competition for shelf space and for the favor of the consumer.

76. Clorox's access to Procter media discounts, personnel, and marketing resources may have increased Clorox's efficiency and its profits. (419 F. Supp. at 936.) This access did not have anticompetitive effects and did not cause any lessening of competition in the bleach business.

3. *Potential Competition*

77. The removal of Procter as a potential entrant into the liquid bleach business, one of the two principal reasons why the acquisition was held illegal, was not claimed by plaintiff either to have raised entry barriers or to have caused it or other producers to compete less aggressively. The evidence does not show that such removal had any discernible effect on Clorox's operations or on the competitive structure of the liquid bleach business.

4. *Summary*

78. The evidence shows that Procter's acquisition of Clorox did not have the anticompetitive effects in the bleach

market that were apprehended in finding it to be illegal. Clorox did not, through the utilization of Procter's size and financial resources or otherwise, engage in price cutting or below cost selling, systematic or otherwise, to the injury of its competitors or new entrants. Procter's reputation and marketing experience did not discourage firms from aggressively competing with Clorox, and the liquid bleach industry did not become less competitive on price and other factors. The evidence did not show that the use, or the threat of use, of media discounts, Procter's personnel and marketing services, Procter's financial resources, joint marketing efforts, or other possible advantages that might accrue to Clorox as a result of the acquisition had the effect of lessening competition in any way, including (i) by raising entry barriers or (ii) by dissuading smaller firms from aggressive competition for fear of retaliation by Procter-owned Clorox.

79. The fact that Clorox's share of market increased during 1957-1967 and the share held by Purex brand bleach decreased does not establish the presence of anticompetitive effects in the bleach market or the lessening of competition in that market. Those changes, which were a continuation of a trend that had begun over 10 years prior to Procter's acquisition of Clorox, were a product of competition. They did not result from Procter's ownership of Clorox, were not brought about through predation, and did not result from a reduction of competition.

IV. ANTICOMPETITIVE ACTS ALLEGED BY PLAINTIFF*

A. *Marketing Expenditures And The "Attack" On Plaintiff*

80. Pre-acquisition Clorox had varied its marketing expenditures among regions in order to meet local competitive conditions. Both before and after the acquisition, these conditions included threats from dry bleach, private label bleach,

* This analysis pertains to plaintiff's claims under both Section 7 of the Clayton Act and Section 2 of the Sherman Act.

and other liquid bleach firms, such as Purex in the PDA and Hilex in Minnesota.

81. During 1957-1967, Clorox divided its market areas into three classifications: Those where it was strong; those where it was relatively even with the competition, including Purex; and those where it was relatively weak. Clorox thereupon set out to improve its condition in all three categories of market areas. It sought to strike a balance between the principle of "spending your money where your business is," and the equally valid principle of attempting to "beef up" advertising and promotions in the problem areas or "targets of opportunity." (419 F. Supp. at 937.)

82. Southern California was an area in which Clorox sought to catch up with Purex, and it spent more money in advertising and promotions there than it did in other areas. (419 F. Supp. at 937-38.) It was in any event necessary to spend more in Southern California to have the same level of advertising effectiveness because of the higher cost of advertising in that area. In all cases, the variations in Clorox's marketing expenditures among regions were modest and commensurate with local market conditions.

83. Clorox's marketing expenditures in the West were warranted by competitive circumstances. Even with extra spending in the West, Clorox's growth merely kept pace with the growth of the total liquid bleach market in that area, while private labels grew more rapidly. In addition, Clorox's spending on marketing on the West Coast steadily declined as a percentage of sales after 1957.

84. Plaintiff asserts that Clorox recognized that Purex was its only competitor on a national scale that had enough money, sophisticated marketing expertise, and capacity for growth to provide a serious challenge to Clorox. Plaintiff asserts that Clorox intended to keep Purex busy in its own areas in order to frustrate Purex's expansion into other markets. Such a battle plan, and the occasional war cries that were emitted to keep up enthusiasm for it, came principally from memoranda prepared by the advertising agency employed by Clorox, rather than

from executives of that company. (419 F. Supp. at 942.) In the circumstances, these statements were no more than normal manifestations of an intent to triumph in the competitive marketplace. (*Cf. id.*)

85. The record does not show that Clorox made sales below cost in any area as a result of increased advertising or other marketing expenditures (apart from Erie. See Findings 90 to 98, *infra.*) (*Cf.* 419 F. Supp. at 938.) Since Clorox was profitable in every region, there was no need to divert funds from one region to another or to subsidize marketing efforts in one area with profits earned in other areas.

86. Purex adopted the same type of marketing strategy as did Clorox. For example, a definitive Purex memorandum setting forth the plans for its liquid bleach for fiscal year 1963 states:

> "Liquid Bleach brand strategy will be:
>
> * * *
>
> "7. Sales promotion dollars should be used in selected opportunity or problem markets. Criteria to determine these markets will include competitive conditions, commodity volume, profit potential, share and/or distribution opportunity, product availability, etc." (Exhibit AJ, page 034090.) (419 F. Supp. at 938.)

87. Clorox's policies and practices after the acquisition of allocating marketing funds were not dependent upon and did not utilize financial help from Procter, did not involve conduct that Clorox could not readily have done before the acquisition or as an independent firm, and did not occur because of any enhanced capabilities resulting from the acquisition. (419 F. Supp. at 934, 936.) Accordingly, these were not acts made possible or caused by the acquisition. There is no evidence that Procter initiated or was in any respect responsible for the allocation of marketing funds, or that Clorox would not have had the same program had there been no acquisition.

88. The allocation by Clorox of marketing funds for use in "problem markets" or in areas where Purex was strong was not anticompetitive; instead, it represented vigorous but fair competition that one would expect among rivals in the marketplace (419 F. Supp. at 937, 949); it had a legitimate business purpose; it involved neither sales below cost nor predatory pricing; it was an ordinary and usual form of competition in the marketing of liquid bleach and other household products; it was a practice pursued by Purex and presumably by other firms (419 F. Supp. at 938); it did not preclude, restrain, or inhibit Purex or other firms from competing on the merits; and it was not exclusionary in any respect.

89. The fact that Procter/Clorox was a substantially larger firm than any other bleach company was not shown to make these practices and policies anticompetitive. Procter's resources, skills, and size were not used or needed by Clorox in the allocation of marketing expenditures, and Clorox was able easily to pursue these practices and policies on a fully profitable basis in every pertinent region. Even considering Procter/Clorox's large size and market positions, the conduct constituted reasonable competition, and was not shown to exclude competition or to have the impact of reducing competition by raising entry barriers or by dissuading smaller firms from aggressive competition.

B. *Clorox's Conduct In Erie*

90. In October 1957, Purex undertook to establish its liquid bleach in the retail grocery stores in Erie, Pennsylvania, where it had not previously been operating and where Clorox had a substantial market share. From the outset, Purex spent in the Erie market, in advertising and coupon discounts, over $3.00 per case sold, as compared with its normal rate of less than six cents. As a result, Purex obtained initially almost complete distribution for its product among the stores of Erie and an initial market share of more than 30 percent. (419 F. Supp. at 940.) Purex's ultimate market share of 10 percent exceeded the 7 percent share it had earlier considered to be a "realistic sales goal" for geographic expansion. (Exhibit BB.)

91. Clorox promptly responded with advertising and promotion expenditures of its own, totaling about ninety cents per case, including price reductions of from three to seven cents, depending upon the size of the bottle, and the sale of ironing board covers and damping bags at minimal prices upon presentation of a Clorox label as a promotion. The normal profit to Clorox per case nationwide is about forty cents. (*Cf.* 419 F. Supp. at 940.) However, the major part of Clorox's spending in Erie was on advertising, not on price reductions or promotions, and a major part of the spending on advertising was simply a result of the fact Clorox was then incurring artificially high costs in connection with a simulated network advertising test that it was running in Erie and elsewhere, and that was planned before and was unrelated to the Purex effort in Erie. The evidence did not show that Clorox sold below marginal or average variable cost in Erie. (*Id.*)

92. One of the plaintiff's contemporaneous documents asserts that the total Purex advertising and promotional expenditures in the Erie test market during the five months following entry were $21,717.00, as against $6,527.00 spent by Clorox. (Exhibit BX.) (419 F. Supp. at 940.)

93. Clorox's conduct in Erie was not made possible by the acquisition. All of the evidence with respect to Erie fails to show that Procter's acquisition of Clorox gave the latter competitive advantages or an enhanced capacity to meet the short term threat of a new entry. The amounts spent by Clorox in Erie did not come from Procter, and could easily have been afforded by Clorox before the acquisition. (419 F. Supp. at 934, 937.) Procter's resources were not used in Erie. Clorox did nothing in Erie that it could not or presumably would not have done had the merger never taken place. (*Id.* at 942.)

94. Clorox's conduct in Erie amounted to no more than vigorous but fair competition that is to be expected of rivals in the marketplace. (419 F. Supp. at 937, 949.) The Clorox response in Erie was neither predatory nor massive under the circumstances. (*Id.* at 946.)

95. There was nothing anticompetitive about the Clorox response in Erie. (419 F. Supp. at 941.) Purex's expenditures in excess of $3 per case in Erie were unprecedented, and this unusually large attack may be expected to elicit a comparable response. (*Id.*) Purex went into Erie expecting that it would be met with a response by its competition, including Clorox, and Purex officials did not consider the Clorox response to their entry to be inordinately strong at the time it occurred. (*Id.*) In fact the response by Clorox was not inordinate or abnormal in view of the advertising and promotional expenditures by Purex.

96. Clorox's response in Erie was a reasonable, normal and usual method of competition and had a legitimate business purpose; it did not constitute excessive promotional spending in response to a new entry. Purex followed similar policies, as was expressly enunciated in the minutes of a conference of its executives, held at Ojai, California, in April 1954. That document recites, under the heading of liquid bleach: "The following agreements were reached on this subject: a)—that we will meet all active competition with some counter-promotion . . . . . couponing, etc., store sales or other . . . . . to protect our position in the market." (Exhibit BQ, page 6.) (419 F. Supp. at 941.)

97. Clorox's conduct in Erie did not preclude or restrict other bleach firms from competing on the merits and was in no sense exclusionary. That such conduct was neither predatory nor restrictive and did not lessen competition in that market is evidenced by the fact that, during the sixteen months that Purex was trying to establish itself in Erie, another competing brand, Austin's, increased its market share from 5 percent to about 24 percent. (419 F. Supp. at 941.)

98. Procter/Clorox's size, skill, resources and market positions were unrelated to the conduct of Clorox in Erie. (*Cf.* 419 F. Supp. at 941-942.) Any firm, large or small, could easily have afforded the extra costs incurred by Clorox in Erie. Clorox's conduct in Erie, even considering Procter/Clorox's large size and market positions, did not exclude competition or have the effect of reducing competition by raising entry barriers or by dissuading smaller firms from aggressive competition.

C. *Bleach Boards*

99. Store proprietors that sell liquid bleach usually display it in the familiar frame-like structures, called "gondolas," that form the interior aisles of the supermarkets. The gondolas contain adjustable shelves that are spaced according to the height of the merchandise stocked thereon. All liquid bleach normally is displayed in the same gondola, each brand being given at least one frontal position, or "facing," for each size, the number of additional facings being dependent upon the judgment of the store management as to how relatively fast-moving the item is. The more facings a brand has, the more likely it is that the "billboard" effect of the successive rows of bottles will catch the eye of the shopper, and the increased number of bottles will lessen the likelihood of the supply becoming fully depleted before the management gets around to replenishing it. Naturally, each distributor of grocery products tries to get as many facings as he can persuade the store manager to accord him. (419 F. Supp. at 938.)

100. Shortly after the acquisition, the brokers of Clorox began proposing to the store managers that they allow them to remove the shelves of the liquid bleach gondolas and stack the bottles solidly from bottom to top, giving stability to the pile by using flat plywood boards to divide the top of one layer from the bottom of the next. This manner of displaying the bleach increased substantially the number of bottles that the gondola could hold, thus lessening the likelihood of an "out of stock" condition. It also enhanced the "billboard" effect which made the display more appealingly noticeable to the customers. These circumstances, plus the willingness of the Clorox brokers to furnish the boards and do the physical work involved in the adjustment, caused many store managers to react favorably to the idea, and "bleach boarding" appeared in many stores. (419 F. Supp. at 938.)

101. It was necessary to cut the boards into sizes that would correspond to the numbers of facings accorded the respective brands, and, inasmuch as the Clorox brokers brought their own saws and did the cutting, it is hardly likely that they

would discriminate against their own product in proposing an allocation of facings. It may also be assumed that a store owner, impressed with the initiative and industry displayed and the valuable service rendered by the Clorox representative, would be likely to resolve in his favor a close decision of who gets a particular facing. (419 F. Supp. at 938.)

102. The practice of "boarding" came early to the attention of the plaintiff, and its response was equivocal and varied. Some of the Purex representatives were instructed to complain to the store owners about the boarding and to try to get them to discontinue the practice. Other Purex salesmen were told that they could offer to put in boards if they felt that they had to do so, but they were encouraged not to engage in the practice generally. For the most part, Purex did nothing about the matter. (419 F. Supp. at 938.)

103. Clorox may have gained an occasional facing from Purex because the hand that held the saw belonged to the former. However, the entire matter of whether a store would accept a bleach boarding program and, if so, how the space in the gondola should be divided, was under the control of the retailer. His objective would be to adopt the system that he felt would sell the most bleach and to allocate the space among all brands sold by the store in accordance with the "movement" of the respective items. Bearing such motivation in mind, instances of unjust or unreasonable curtailment of Purex facings because of the Clorox boarding program could not have been very widespread. A Purex inter-office memorandum dated June 2, 1965, discussed the results of a "liquid bleach shelf exposure" study, performed by A.C. Nielsen Company, for a year ending in March 1965. The memorandum stated one of its "observations" to be that "Purex shelf facings remained relatively unchanged within each of the Purex regions and very favorable as compared with sales shares." (Exhibit V, page 2.) (419 F. Supp. at 939.)

104. Clorox's bleach boarding efforts did not involve acts made possible by the acquisition. These efforts did not depend on or use financial or any other form of assistance from Procter, were well within the capabilities of pre-acquisition Clorox, and

could readily have been accomplished by Clorox as an independent firm. (419 F. Supp. at 934, 936-37.) The retailers' acceptance of the program was not attributable in any way to Procter's ownership of Clorox. There is no evidence that Procter initiated or was in any respect responsible for the bleach boarding program, or that Clorox would not have had the same program had there been no acquisition.

105. Bleach boarding was not anticompetitive or an unfair commercial practice. The boarding program was a commendable initiative and constituted an instance of enlightened services to the store owners and to the bleach industry as a whole. (419 F. Supp. at 939.) It also represented vigorous but fair competition that one would expect from a seller of liquid bleach. (*Id.* at 937, 949.) Bleach boarding was not preclusive or restrictive of competition; all firms were free to seek additional shelf space, to seek to install their own boards, to seek special displays, and otherwise to compete for advantageous shelf position. Purex and retail stores on their own from time to time installed bleach boards.

106. The size, resources, skill and market positions of Procter/Clorox were unrelated and irrelevant to the bleach boarding program. Clorox engaged in the program with no financial help from Procter or elsewhere and sold its product at a profit. (419 F. Supp. at 934.) The bleach boarding program, even considering Procter/Clorox's large size and market positions, did not exclude competition or have the effect of reducing competition by raising entry barriers or by dissuading smaller firms from aggressive competition. The bleach boarding program was a reasonable business practice and had a legitimate business purpose.

D. *Advertising References To "Weak Bleach"*

107. Some time after the merger, Clorox began to advertise the claim that Clorox gets out dirt better than do "weak bleaches." The chemical content of all liquid bleaches is substantially the same (or was until Purex introduced its more concentrated 6 percent bleach). (419 F. Supp. at 939.) Clorox asserts that this advertising was directed at dry bleaches, which

are demonstrably weaker, and that its advertising is also justified because of the relatively rapid shelf turnover that Clorox enjoys, so that there usually is less time for it to deteriorate before being sold and is therefore likely to reach the consumer at higher strength than do slower moving bleaches. (*Cf. id.*)

108. The "weak bleach" advertising theme did not involve conduct made possible by the acquisition. The theme did not depend on or use the financial or other resources of Procter and could readily have been done by Clorox as an independent firm. (419 F. Supp. at 934, 936.)

109. The "weak bleach" advertising was not preclusive, exclusionary or restrictive of competition and was not otherwise anticompetitive. It was simply a reasonable advertising message typical of household cleaning products and of liquid bleach, and had a legitimate business purpose. Any bleach firm, regardless of size, was able to advertise and could choose any number of equally valid advertising themes. Purex at times used an identical "weak bleach" theme; at other times it chose to advertise its product as "mild" and "gentle." (*Id. cf.* 419 F. Supp. at 939.) The use of such advertising themes represented the vigorous competition that one would expect from rivals in the marketplace. (*Id.* at 937, 949.)

110. Procter/Clorox's size, resources, skill and market positions were unrelated and irrelevant to the "weak bleach" theme. Even considering Procter/Clorox's large size and market positions, there was no evidence that this advertising reduced competition by raising entry barriers or by dissuading smaller firms from aggressive competition, or that it excluded competition.

E. *The Litmus Test*

111. Despite the substantial chemical similarity among all liquid bleaches, Clorox's product apparently did have a somewhat lower pH, or alkalinity, factor. Prior to the acquisition, Clorox discovered that this quality caused Clorox to turn litmus paper white a bit more rapidly than did other brands. Clorox thereupon prepared demonstration kits that it furnished to

some of its broker representatives, along with an instruction sheet that showed them how to prove to the trade that Clorox was stronger and faster-working than Purex and the other liquid bleaches. One of the printed instructions cautioned, "do not leave both samples on the table or in view, as both will eventually turn the same color." The demonstrations apparently were conducted several times in about 1964-65 for the "education" of the retail trade, but they were not directed toward consumers. (*Cf.* 419 F. Supp. at 939-40.)

112. Purex responded with a litmus test of its own that was designed to expose the Clorox demonstration. The Purex assessment of these competitive demonstrations at about the time they were occurring is set out in the final paragraph of a memorandum written by one of its principal executives on November 15, 1965:

> "It is doubtful the CLOROX demonstration will have had a great impact upon the trade. They have tried it before in other Purex markets with no success! Last year in Los Angeles, for example, we found that we were very effective in turning the tables on them by explaining to the trade what the actual demonstration represented. When we conducted our own demonstration and proved to them that the conclusions reached by CLOROX were untrue, we found many of our customers were upset with their CLOROX representatives. We felt that our own demonstration was quite effective on scoring a slight advantage over CLOROX and in a very short time CLOROX stopped using their demonstration." (Exhibit W.)

This is a correct analysis of the matter. (*Cf.* 419 F. Supp. at 940.) The litmus test had no discernible impact on the market positions of Clorox or Purex.

113. The "litmus test" did not involve conduct made possible by the acquisition. It did not depend on or use Procter's financial, marketing or other resources, and could readily have been done by pre-acquisition Clorox. (419 F. Supp. at 934, 949.) There is no evidence on which to conclude that the same thing would not have occurred had there been no acquisition.

114. The litmus test was not anticompetitive but was instead an instance of vigorous competition within the rules of the marketplace. (419 F. Supp. at 937, 948.) It did not preclude or restrict other firms from competing on the merits or from conducting similar tests, as Purex did, and was in no way exclusionary.

115. Procter/Clorox's size, skill, resources and marketing position were irrelevant and unrelated to the litmus test. Salesmen or brokers of any firm, no matter how large, could have done the same or comparable tests, as Purex did. Even considering Procter/Clorox's large size and market positions, there was no evidence that the litmus test tended to reduce competition by raising entry barriers or by dissuading smaller firms from aggressive competition, or that it excluded competition or unreasonably restricted competition among bleach manufacturers.

F. *The Washing Machine Cooperative Program*

116. Beginning in about 1958, Clorox started proposing to washing machine manufacturers a cooperative program under which the latter would include liquid bleach dispensers in their manufactured products, along with promotional materials describing how the washing process could be enhanced by proper application of liquid bleach, particularly Clorox. By 1964, about 85 percent of the manufacturers of washing machines sold in the United States were participating in this program. (419 F. Supp. at 941.)

117. Clorox never had engaged in such activity prior to the merger and its washer-cooperative program stemmed from Procter's earlier participation in comparable programs with the same manufacturers in promoting its soaps and detergents. (419 F. Supp. at 942.)

118. Purex could have established similar relationships with the washing machine manufacturers. In fact, Purex engaged in, or at least planned for, its own cooperative program with washing machine manufacturers for the benefit of its dry bleach products. (419 F. Supp. at 942.)

119. The inspiration for this program by Clorox came from Procter, and its success was enhanced by Procter experience and research. The program, however, was not dependent upon and did not use Procter financial assistance or other resources, and could readily have been done by Clorox as an independent firm (just as Purex had a similar program for dry bleach). (*Cf.* 419 F. Supp. at 934, 937, 942.) There is no evidence on which to conclude that Clorox would not have done the same thing had there been no acquisition.

120. The program was in no way anticompetitive and, due to earlier monitoring by the Federal Trade Commission, the relationships that Clorox established with the manufacturers were not exclusive. The promotional materials placed in the washing machines at time of sale asserted or implied that Purex and the other liquid bleach products shared with Clorox the ability to produce the claimed superlative effect upon machine-washed clothes. (419 F. Supp. at 942.) This assisted the sale of all liquid bleaches in competition with detergents and other products. The program was reasonable, was not exclusionary, had a legitimate business purpose, and did not preclude Purex or other firms from seeking similar non-exclusive arrangements for liquid bleach, dry bleach or other products.

121. Procter/Clorox's size, skill, resources, and market positions were unrelated to the washer cooperative program. Even considering Procter/Clorox's size and market positions, the evidence did not show that the program reduced competition by raising entry barriers or by dissuading smaller firms from aggressive competition, or that the program excluded or inhibited competition.

G. *Summary of Clorox Conduct*

122. The conduct complained of by Purex did not involve acts made possible by the acquisition; none of it was dependent upon financial help by Procter. (419 F. Supp. at 934.) Anything that Clorox did after the acquisition it had the full capability to do before; Clorox did nothing after the acquisition that it could not readily have done before the acquisition. (*Id.* at 934, 937.) The vast resources of Procter were not used to give Clorox capabilities that previously were unavailable to it. (*Id.* at 936.)

There was no evidence on which to conclude that Clorox would not have engaged in the same or comparable conduct absent the acquisition.

123. Post-acquisition Clorox simply engaged in vigorous but fair competition after the acquisition in the same manner as before. (419 F. Supp. at 949.) The acts complained of amounted to no more than vigorous competition that one would expect among rivals in the marketplace. (*Id.* at 937.) The conduct did not preclude, restrict, or inhibit any other firms from competing on the merits and using the same or comparable marketing techniques. There was no showing of any combination in restraint of trade. (*Id.* at 949.) The conduct was reasonable, was not predatory or exclusionary, and had legitimate business purposes.

124. Procter is a firm of very substantial size, and sophisticated marketing skills, with leading positions in a number of household cleaning products markets. Clorox had a leading share of the liquid bleach business in many regional markets and nationally. Viewed in the light of these factors, however, the evidence did not show that the conduct, even when viewed collectively and not in isolation, reduced competition in the bleach industry by raising barriers to entry or by dissuading smaller firms from aggressive competition, or that it excluded competition.

125. The evidence did not show that the conduct complained of caused a lessening of competition in the bleach industry. In fact, throughout the period of the merger, many smaller brands competed successfully with Clorox in their respective local regions, and the growth in market share of private label, a large amount of which was manufactured by plaintiff, exceeded that of Clorox in some areas of the nation. (*Cf.* 419 F. Supp. at 949.)

126. Since the conduct of Clorox of which Purex complains was not predatory, exclusionary or anticompetitive in any respect, the conduct does not permit an inference that Clorox acted with the intent to injure or destroy competition. Purex relies on a portion of an outline that was prepared in 1966 for

use by a Clorox division sales manager in a presentation to a meeting of Clorox distributors which states:

> "Clorox position—*defend* and *protect* our business. Purex will hurt *you* only if *you* let them. Clorox will supply the gun, but *you* must pull the trigger." (Exhibit 1466.)

Such comments do not establish an intention to injure competition or to deprive Purex of the means of continuing its business. (419 F. Supp. at 942.) In the circumstances they represented merely normal manifestations of an intent to triumph in a competitive marketplace. (*Cf. id.*)

V. ATTEMPT TO MONOPOLIZE AND MONOPOLY ISSUES

A. *Intent To Monopolize*

127. Clorox's intent, as shown by both its contemporaneous conduct and statements, was to compete vigorously, to increase its sales and profits, and to act strictly within the rules of the marketplace. (*Cf.* 419 F. Supp. at 942.) The evidence did not show an intent to monopolize, to injure, preclude, or inhibit competition, or to drive competitors out of business.

B. *Probability Of Achieving Monopoly*

128. Liquid bleach is easy and inexpensive to make from raw materials that are readily available, and there are no patents or similar barriers to entry. (419 F. Supp. at 949.)

129. Liquid bleach is relatively inexpensive and an item of frequent purchase. The housewife has repeated opportunities to transfer her patronage as promotions and price reductions and new offerings may tempt her. (419 F. Supp. at 949.)

130. In the period since the record was made in the FTC proceeding, essentially since 1960, sales of private label bleaches, which are the labels of the grocery and other retail outlets, have come to represent a substantial volume and to constitute a substantial share of the market. (*Cf.* 419 F. Supp. at 945.) Thus, during the merger period, private label liquid bleach was sold in ever-increasing quantities to more and more customers. (*Cf.* 419 F. Supp. at 945.)

131. The retail grocery trade controls the channels of distribution for liquid bleach. Grocery trade support is essential for the success of a liquid bleach product. The retail stores that purchased and resold liquid bleach under their own private labels quite naturally gave preferential treatment to their private label bleach. Throughout the period of the merger sales of private label bleach increased much faster than did those of Clorox. (419 F. Supp. at 945.) The growth of private label and the resulting strategic position of the retail chain stores in the bleach market, developments which could not have been anticipated by the FTC or the Supreme Court but which are spelled out in detail in the evidence of record, made it highly unlikely that Clorox could obtain a monopoly in the liquid bleach market.

132. Liquid bleach is hardly conducive to monopoly (419 F. Supp. at 949), and the evidence did not show a significant probability that Clorox could achieve power to control price or exclude competition in the liquid bleach market.

C. *Clorox Was Not Shown To Have A Monopoly*

1. *Power To Control Price*

133. Clorox was not shown to have the power to control the price of liquid bleach in any market. Instead, the evidence showed continuing price competition not only on list price but also on the basis of sales-promotions, trade discounts, coupons, cents-off deals and the like. The price competition from private label bleach forced Clorox on at least two occasions in the mid-sixties to make substantial reductions in its list prices.

2. *Power To Exclude Competition*

134. The evidence did not show that Clorox had the power to exclude competition from any market.

135. Clorox was not shown to have power to exclude Purex when Purex sought to enter new geographic areas. Purex regarded its 10 percent share in Erie in 1957-59 as a satisfactory accomplishment, and it withdrew from the market for reasons unrelated to Clorox. (419 F. Supp. at 941.) In October 1962, Purex introduced Purex Liquid Bleach in the Cleveland market.

Although Clorox responded to this introduction, Purex met with substantial success. In 1965, Purex introduced Purex Liquid Bleach in Florida. In 1966-1967 Purex brand liquid bleach was introduced in the Carolinas and in the Northeast. Purex quickly gained significant distribution and market share. In fiscal 1969, Purex entered New England. (*See* Exhibit 1650 (rev.), Table 1, year: 1969, page 8.) These expansions resulted in near national coverage for the Purex brand liquid bleach business; in contrast, Purex had not expanded (except for a short-lived foray into Florida in the late 40's) for the twelve years preceding the acquisition.

136. Clorox's share of the national liquid bleach market (45 percent in 1957 and 53 percent in 1967) and in various regions (up to 75 percent) does not establish that it had monopoly power either nationally or in any region. All the evidence of record, including the nature of the product, absence of patents or similar barriers to entry, availability of raw materials, ease of manufacture, frequency of purchase, the critical position of the retailer-competitor in the distribution system, and continuing price competition, establishes that, notwithstanding its share of the market, Clorox lacked the power to control prices or to exclude competition in the liquid bleach business. (*Cf.* 419 F. Supp. at 949.)

D. *Claims Of Monopolization*

137. In certain markets in the East where Purex was not distributed until late in the period of the merger, Clorox enjoyed market shares that were as high as 84 percent. (Exhibits IF, IG, IH.)

138. The evidence did not show that Clorox attained or held its eastern market shares by restrictive or exclusionary conduct or by improper means, or that such shares were achieved other than as a result of business acumen, a quality product, marketing skill, and business practices that were entirely reasonable in the circumstances.

139. The evidence did not show that Procter acquired or operated Clorox for the purpose or with the intent of achieving a monopoly in any liquid bleach market.

140. Even if it be assumed that Clorox had a monoply in certain eastern markets, plaintiff did not compete in those markets and none of the conduct of which plaintiff complains involved the use of any market power that Clorox may have had in such markets to gain a competitive advantage in other markets in which it was competing with plaintiff or to impair plaintiff's efforts to expand into any market.

VI. THE CAUSE OF PLAINTIFF'S CLAIMED INJURY

A. *Plaintiff's Claims Of Injury To Its Bleach Business*

141. Plaintiff claims that, absent the acquisition and the conduct complained of, it would have maintained its relative proportion of combined sales of Clorox and Purex brand bleach in its distribution area (PDA), and asks damages of millions of dollars in profits allegedly lost because its proportionate share of the combined sales declined after 1957. (419 F. Supp. at 943.) Among other deficiencies, this claim ignores the business acumen that Clorox had shown for many years prior to the acquisition in overtaking Purex in the PDA, disregards the effect of Purex's own business calculus on its sales of the Purex brand of bleach, and omits all reference to the substantial amounts of new liquid bleach business that Purex secured during the merger period under brand names other than "Purex." The reason why Clorox kept ahead and perhaps gained a little on Purex after the merger was that the plaintiff did not try to keep up as far as liquid bleach was concerned either before or after the acquisition. Purex held back on advertising Purex brand liquid bleach, and emphasized its family of brands, pushed its dry bleach, and emphasized private label liquid bleach.

142. Ever since the end of World War II, Clorox was more successful in marketing liquid bleach than was Purex. Well before the merger, Purex officials were thoroughly aware of this trend and regularly expressed concern. For example, a forty-page memorandum, prepared some time in 1956 to aid in planning the Purex 1957 advertising program, begins by reciting that "Purex has increased its liquid bleach sales 10% since 1952 (equal to the population increase), but Clorox has

increased 46%, 'all others' 25%. In Purex territories, Clorox is weaker, increasing only 38%—but 'all others' increased 31% against the Purex 10%." On July 6, 1955, a senior Purex official expressed concern about the tendency for Clorox "to be regarded as generic for bleach." (Exhibit 1614, page 3.) And a memorandum of a conference attended by several Purex executives on December 15, 1955, states: "Facing the fact that Clorox, with heavy advertising expenditures, continues to steal business from Purex, it was agreed that imagination must be applied to our marketing concept and that Purex must be made to stand out attractively as a more desirable product on the retail shelves." (Exhibit Q, page 2.) (419 F. Supp. at 936-937.)

143. The sales of Purex brand liquid bleach grew throughout the merger period, but this growth was not as rapid as that of Clorox bleach, private label, and the liquid bleach market generally. (Exhibit JI.) The Purex brand liquid bleach share of the combined Purex/Clorox sales in the regions of the United States where Purex was doing business declined from about 58 percent in 1946 to about 46 percent at the time of the acquisition in 1957. Thereafter, the Purex brand comparative percentage figure kept going down at substantially the same rate until it reached about 33 percent when the divestiture was completed at the beginning of 1969. As might be expected, the graphic line of descent was not exactly straight. (Exhibit ATA.) On the contrary, it showed occasional short-lived tendencies to level off. One of these brief pauses occurred in 1955 and 1956, about a year before the merger. There is no evidence that this was caused by Purex's finally having solved the problem of competing with Clorox, or that the resumption of the decline in its percent of the combined sales was attributable to the acquisition. (419 F. Supp. at 937.)

144. The graphic line of descent shows that other temporary plateaus, even upswings, occurred in 1960 and 1966, well after the merger, and they and the leveling off in 1955-56 were no more than pauses in the downward trend that had marked the plaintiff's record of competition with Clorox ever since World War II. (Exhibit ATA.) (419 F. Supp. at 937.)

145. The decline in the Purex brand's share of combined Purex/Clorox sales in the PDA during the period in suit was a continuation of Clorox's marketing superiority which began over ten years before the acquisition. Of equal importance, it was also due to Purex corporate goals that subordinated Purex brand bleach sales to corporate diversification, as is set out in the following findings.

1. *Plaintiff's Corporate Success*

146. Throughout the period of the merger, Purex was a successful and ably managed corporation. Its annual pre-tax profits increased rather steadily from about $3.6 million in 1958 to $19.5 million in 1967. (Exhibit DE.) During the same period, its pre-tax profits from the sale of its Purex brand liquid bleach also showed steady improvement, growing from $1.7 million in 1958 to $2.7 million in 1965. (Exhibit DS.) (The 1966 and 1967 profits from Purex brand bleach dropped to $386,000 and $527,000 respectively. This reduction appears to have been due principally to the large expenses incurred in eastern expansion during those years.) (419 F. Supp. at 943.)

2. *Plaintiff's Diversification Program*

147. In about 1946, Purex management adopted the strategy of growth through product diversification, rather than remaining a one product company. This strategy was vigorously carried out, with the result that by 1968 Purex was marketing more than thirty additional products, most of which were obtained through acquisitions of other companies. (419 F. Supp. at 943.)

148. By about 1953, Purex had adopted the policy of marketing and advertising its household products as a "family of brands," and it used profits from the sale of Purex liquid bleach to subsidize the development, marketing and advertising of the other members of the "family." (419 F. Supp. at 943.)

149. Purex's strategy worked very well in the financial interests of the corporation as a whole. But it deprived Purex brand liquid bleach of the promotional and advertising funds that it needed in order to increase, or even maintain, its share of

the market. The effect upon Purex liquid bleach was predictable, and danger flags were hoisted from time to time within the corporation. In October 1956, the plaintiff's marketing experts made a detailed written presentation on liquid bleach which adverted to the fact that during the past four years Purex had steadily lost market share, not only to Clorox, but to the "all other" category of manufacturers as well. The study then stated that "We have all been aware of this problem of a slowly disappearing market share, and there are several reasons behind it. We know, for example, that as a matter of policy we have devoted a considerable portion of the advertising funds earned by liquid bleach to the development of other brands of the corporation. As a matter of fact, this chart shows the relative expenditures of Clorox and PUREX; and in the most recent year—which is the most favorable comparison, we are spending only about ⅕ of the money that Clorox is . . . ." (Exhibit 1622, pages 2-3.)(419 F. Supp. at 943-44.)

150. In April 1957, Jack Northrup, the Purex sales manager, wrote in a memorandum that advertising support was badly needed for Purex liquid bleach ". . . because this brand had been milked so badly in the past years and results are now becoming apparent in loss of market position." (Exhibit 1626, page 2.) A few months later, in August, the very month in which the acquisition of Clorox by Procter occurred, a management committee of Purex, the Marketing Research Action Committee, noted in a memorandum:

> "Problem: During the past year liquid PUREX has slightly lost both share of volume and share of families buying. This decline during the past year is part of the long-term three or four year PUREX decline which we have noticed from Neilsen reports.
>
> "Discussion: It was felt that the basic cause of this decline was lack of advertising expenditures over a long period of time. The money that this brand earns has not been returned to the brand because it has been a policy of the corporation not to spend any money on this brand until there is something really worth advertising. (In the past it has been found that

> advertising Liquid Bleach in its current form proved to be rather unproductive.)" (Exhibit HO; *see also* Exhibit AO.)

This statement is an accurate description of the matter. (*Cf.* 419 F. Supp. at 944.)

151. Despite these and other expressions of concern, the marketing expenses for Purex liquid bleach continued at a greatly reduced level through 1964. Although sales of Purex liquid bleach suffered because of this lack of support, the corporation was willing to accept the resulting disadvantage, inasmuch as the diversion of funds to aid the development of other products produced such pleasing results. Thus, in 1965, Mr. A.C. Stoneman, the chief executive officer, reported that the "past 10 years of Purex growth is evidence of the success of our long-range plans for expansion of Purex into a multi-product, diversified, national and international marketer." (419 F. Supp. at 944.)

152. The plaintiff's diversification program was achieved at the expense of maximum development of its liquid bleach business. (419 F. Supp. at 943.) Throughout the years between about 1953 and 1964, when Purex was withholding adequate market support from its liquid bleach as part of its corporate strategy, Clorox continued to maintain a comparatively strong advertising program for its sole product. (Exhibit ATX.) These circumstances constitute the principal reason for the Purex decline in market share during the period of the acquisition. (419 F. Supp. at 944.)

3. *Dry Bleach*

153. One of the plaintiff's products that it tried hard to promote during the period of the acquisition was its dry bleach that it called "Beads O' Bleach." Between 1958 and 1964, more than 30 percent of the sales revenue from this product were devoted to such promotions. This was made possible by cutting the expense of advertising liquid bleach to about 5.5 percent of its gross sales. (Exhibit ATX.)(419 F. Supp. at 944.)

154. The policy of the Purex Company with respect to dry bleach was made clear at the outset in a January 4, 1956,

memorandum by one of the Purex executives. He referred with approval to the idea of mounting a major advertising campaign in support of Beads O' Bleach and then said that such a plan

> "... means that liquid bleach would be without advertising pressure, except as it benefited from the reminder value of the name 'Purex' in Beads O' Bleach advertising. We plan to strongly emphasize the name 'Purex' in all Beads advertising and, of course, in Purex Dry Bleach copy. By eliminating liquid we can strengthen our Purex dry bleach advertising story, which is not emasculated by the forced combination with liquid.
>
> "Lack of advertising on Trend and liquid bleach for this period might do some things to their sales and brand position. But we believe the risk is least on these brands, and one we can live with. It will have the smallest adverse effect on company profits, and offers a chance for important contributions to profit from Beads and ODC if we can get these brands moving up." (Exhibit AL.)(419 F. Supp. at 944-45.)

155. The advertising campaign that Purex mounted on behalf of its dry bleach during the years of the merger was largely devoted to trying to persuade the public to use Beads O' Bleach instead of liquid bleach. Support was taken from Purex liquid bleach in order to finance a sales program that was designed to harm the very source of its funds. (419 F. Supp. at 945.)

156. The plaintiff sought to promote its dry bleach at the expense of liquid bleach. (419 F. Supp. at 944.) To the extent this effort was successful, the resulting injury to plaintiff's sales of liquid bleach was caused by plaintiff's own business decision to promote dry bleach to the detriment of its own liquid bleach brand. (*Cf. id.* at 945.)

4. *Private Label*

157. Purex also enhanced its corporate profits at the expense of its branded liquid bleach by its practice of manufacturing high quality liquid bleach for sale by chain stores under

their private labels. During the entire period of the merger, Purex was among the nation's principal suppliers of private label bleach, and it sold ever-increasing quantities to more and more customers. Practically all of these customers operated chain stores, and they gave preferential sales promotion treatment to their private label bleach. (*Cf.* 419 F. Supp. at 945.)

158. As early as 1959, the national sales manager of Purex wrote a memorandum in which he adverted to the "mounting inroads" into the Purex liquid bleach market brought about by a continued growth of "private label." He proposed a solution to this dilemma that would involve accepting a new customer for private label bleach only after careful assessment of whether such customer could get it elsewhere and whether supplying the customer with private label bleach would increase his total business with Purex. (Exhibit S.) (419 F. Supp. at 945.)

159. Despite any occasional attempts to control the proliferation of private label bleach, Purex continued to increase this phase of its business. Plaintiff recognized that such activity was seriously harmful to sales of Purex branded bleach, and that liquid bleach sold under private label cut into the plaintiff's branded liquid bleach market. For example, on November 5, 1963, a staff memorandum submitted to the head of market research for the Purex Corporation contained an analysis of the Neilsen Reports for the years 1961 to 1963. The memorandum expressed the concern that Purex was losing its share of the chain store market business to the private labels and asserted the belief that Clorox fared better from such competition because "Purex appears—to be a more substitutable brand than Clorox." (Exhibit DH.)(419 F. Supp. at 945.)

160. On June 8, 1964, a Purex executive wrote in a memorandum that "I don't think there's any more important project than that we learn how to successfully sell Purex Liquid Bleach to the consumer in the face of increasingly vigorous Private Label competition and the increased price spread that now exists between Purex and Clorox and Private Label brands." (Exhibit AP.)(419 F. Supp. at 945.)

161. Sales of private label bleach increased much faster than did those of Clorox, a fact that reaffirms the validity of the

above-mentioned concerns expressed by the plaintiff's executives that the loss of market share on Purex branded bleach was more to private label than to Clorox. (419 F. Supp. at 945.)

162. Plaintiff nonetheless constantly increased its sales of private label liquid bleach. Its sales of such bleach grew from 87,000 cases in 1953 to 664,000 cases in 1957 to 3,407,000 cases in 1967. Moreover, plaintiff sold private label at a much lower price than it charged for the Purex brand. On at least one occasion during the merger period Purex sought to increase the price for its brand while lowering the price of its private label.

163. Plaintiff's own business decision to supply increasing amounts of private label at a low price was yet another way in which plaintiff's own business calculus knowingly and significantly harmed the market share of the Purex brand of liquid bleach.

5. *Summary*

164. Purex's comparative inferiority in marketing Purex liquid bleach stemmed principally from decisions of its own management, rather than having been imposed by Clorox. (419 F. Supp. at 934.) These decisions principally involved the diversification program, dry bleach and private label.

165. Any effect of Clorox's conduct on the declining market position of the Purex brand (for which plaintiff claims damages) was far outweighed by the sum of a series of actions and policies undertaken by the plaintiff. (419 F. Supp. at 943.)

166. Clorox increased its ascendancy over Purex during the period of the acquisition principally because it simply did a better job in marketing liquid bleach, just as it had done before the acquisition. (419 F. Supp. at 943.) Pre-acquisition Clorox regularly did a better job in marketing liquid bleach than did Purex, and the same trend continued after the merger. (*Id.* at 936.) The decline in Purex's percent of combined Clorox/Purex sales was not attributable to the acquisition. (*Id.* at 937.)

167. Plaintiff was simply unable to show that it suffered any damage as a consequence of the acquisition. (419 F. Supp. at 934.) The continuing decline in its market position was not

shown to have been attributable to the effects of the acquisition, or to any slackening of competitive effort on its part for fear of retaliation by Procter-owned Clorox. Plaintiff was not afraid to compete with Clorox. Plaintiff has failed to prove that it was damaged in any fashion by any of the conduct it complains of. The evidence instead shows that the claimed "lost profits" would not have been earned even in the absence of the acquisition or of the conduct complained of.

168. Purex's sales of liquid bleach, both in the aggregate and relative to Clorox, reflected the corporate and marketing policies that were pursued by Purex, both prior to the acquisition and subsequent thereto, wholly without regard to the acquisition or to Clorox's conduct in the marketplace.

169. Plaintiff has failed to show that either the acquisition or Clorox's conduct of which plaintiff complains or its claimed fear of retaliation by Proctor-owned Clorox was a substantial factor in, or a material or proximate cause of, the continuing decline in liquid bleach market share that the Purex brand experienced in the PDA.

170. Plaintiff has not shown that the continuing decline in liquid bleach market share that the Purex brand experienced in its own distribution area occurred by reason of that which made Procter's acquisition unlawful or as the result of conduct on the part of Clorox under Procter ownership which plaintiff claims to be illegal. The requisite relationship between that decline and the acquisition or the conduct of Clorox under Procter ownership has not been shown.

B. *Plaintiff's Claim That Its Expansion Was Thwarted*

171. Plaintiff claims that it was ready to launch a major program of expansion into the eastern areas of the United States early in 1958. It insists that its experience in Erie, coupled with Purex management's knowledge of Procter's immense market power, led Purex to the realization that it would be impossible for it to carry out expansion plans, and so it deferred them indefinitely. Plaintiff seeks damages for the millions of dollars that it estimates it would have earned in additional profits had it been able to pursue its eastern expansion as scheduled. (419 F. Supp. at 946).

172. The contemporaneous actions and documents of Purex disclose no sign of the alleged all-pervading fear of post-merger Clorox that plaintiff claims to have frustrated the Purex expansion plans. (419 F. Supp. at 946.)

173. Such actions and documents require rejection of the trial testimony of Mr. Stoneman that the experience in Erie taught him that Purex could not hope to compete with Clorox on a national basis. (*Cf.* 419 F. Supp. at 946.)

174. In August 1958, within six months after the reportedly discouraging experience in Erie, Mr. Stoneman renewed negotiations for the purchase of the John Puhl Division of Sterling Drug, Inc. In a memorandum written by Mr. Stoneman at the outset of such negotiations, he "explained" to the seller that "we were still interested in expanding our liquid bleach business from our area position to a national one;" and that "... we were interested in investigating the possibility of purchasing a position in markets where we did not now distribute liquid bleach prior to making plans for expansion by other means." (Exhibit BF.) (419 F. Supp. at 946.) One month later, Vice President Davidson submitted to Mr. Stoneman a memorandum which recommended the acquisition of the John Puhl Division "... as the most feasible step toward nationalizing Purex liquid bleach by expansion into non-Purex areas." (Exhibit CF, page 5.) (419 F. Supp. at 946.)

175. In March 1959, the Administrative Committee of Purex prepared a sales forecast for fiscal 1960. It stated that the two major problems facing Purex liquid bleach to be "(1) an upsurge of private label brands combined with (2) the forceful marketing strategy of Clorox." However, it expressed the belief that the forthcoming Purex marketing strategy would be able to make progress in solving these problems, and it referred to the matter of expanding into eastern markets and Florida as "open." (Exhibit BG, pages 445057, 445059.) (419 F. Supp. at 946.)

176. Purex intracompany memoranda between the late 1950's and about 1965 made frequent mention of the hope and expectation of taking liquid bleach into eastern markets. However, these expressions usually acknowledged the need, first, to

find a new innovation for the product and an improved means of packaging it. (419 F. Supp. at 947.) They did not refer to Procter's acquisition of Clorox or the latter's conduct of the bleach business as inhibiting expansion.

177. One of the disappointing by-products of the test market in Erie (*see* findings 60-65, *supra*) was the realization that the adding of a foaming aspect to the bleach and the use of a new glass bottle with a "coffee-pot handle" did not prove to be as popular as had been hoped. And so, the search continued for the "perfect package" and for a better innovation for the product as conditions precedent to direct eastern expansion. The importance of such a search was emphasized by Mr. Stoneman at the annual stockholders' meeting in October 1962. He was asked if Purex planned to expand its present markets " . . . so as to have national penetration of all Purex products." His response: "Our basic marketing strategy is to expand distribution of our products geographically or to reach for a larger share of existing markets when we have a product or packaging innovation to aid us in accomplishing our goals. It is relatively inexpensive to expand a product's position during a period of change as compared to the high cost of expanding market shares when the product type is static. If you try to expand your market share when the product is static you are engaging in a toe-to-toe slugfest with your competition and this is not the way to increase a corporation's net earnings." (Exhibit BL, page 31.) (419 F. Supp. at 947.)

178. At the same meeting, the chairman of the board of Purex gave another significant answer to a similar question: "Eventually we will be national on bleach but we are not going to . . . make a three, four or five-year investment in this distribution in order to be national when we can get so much better return by putting this same money into other products. Eventually we will be national." (Exhibit BL, pages 55-56.) (419 F. Supp. at 947.)

179. Two years later, at the 1964 stockholders' meeting, management again was asked if Purex intended to market its liquid bleach nationally. The response was given in a letter by Vice President Davidson: "If we wanted to spend the money to get national distribution on liquid bleach we could get it. But it

would take a lot of money to enter markets where other brands have been entrenched solidly with retailers and consumers for many years, and we can make more money by going into other products, for example, promoting dry Beads O' Bleach." (Exhibit BK.) (419 F. Supp. at 947.)

180. In about 1965, Purex came up with six percent bleach, which it proclaimed as "truly something far greater than just another liquid bleach." (Exhibit 1420.) A bit earlier, Purex had been able to produce satisfactorily a new plastic bottle that it had been working on for several years. Having found the product innovation and new package for which it long had been searching, Purex carried its liquid bleach into several of the southeastern states, and, in 1967, it went into the northeastern part of the country. (*Cf.* 419 F. Supp. at 947.)

181. The record shows that during this entire period between 1958 and 1967, the Purex executives and the salesmen in the field wrote many communications concerning the hopes, problems, triumphs and frustrations that were experienced in contemplating, planning and carrying out the program of eastern expansion. There are frequent references to Clorox, sometimes as a major competitor, and sometimes as not having been as formidable as had been anticipated. But nowhere in the record in those years is there any suggestion that Purex could not or should not expand because of fear of retaliation by Clorox under Procter ownership. (419 F. Supp. at 947.)

182. Purex in 1957-1958 did not have an intent to expand and had not made preparations or plans to expand. (*Cf.* 419 F. Supp. at 946.) The evidence did not show that Purex ever determined not to expand because of any fear of retaliation by Clorox under Procter ownership or because of any conduct on the part of Clorox. Instead, the timing and the manner in which Purex entered new markets were dictated by its own corporate strategy as to what would best enhance the progress of the company, and fear of retaliation by Procter/Clorox played no significant part in these decisions. (419 F. Supp. at 947.)

183. There is no evidence that Purex had the plans, or made preparations or any efforts to expand at any time earlier

than its actual expansion efforts. At trial, Mr. Stoneman acknowledged that the Bristol, Pennsylvania, plant was wholly inadequate for expansion. (Trial Tr. 1752.) There is no evidence that plaintiff made any plan or effort to establish either the six or seven additional plants that its contemporaneous documents said would have been required for expansion (Exhibits BR, CB), or the three plants that its trial witness said would have been required for expansion. (Trial Tr. 2812.)

184. Such responses as Clorox made to Purex's expansion efforts did not thwart or frustrate the latter's expansion plans.

185. The conclusion is inescapable that the plaintiff saw in the divestment order an opportunity to use its newly discovered and retroactive fear as a means of obtaining a multi-million dollar windfall recovery from the defendants. (419 F. Supp. at 947-48.) The claim of Purex that its national expansion plans were frustrated by its fear of post-merger Clorox is an afterthought induced by the contemplation of this litigation. (*Id.* at 934.)

CONCLUSIONS OF LAW

1. Plaintiff is not entitled to recover on its claims under Section 7 of the Clayton Act because the preponderance of the evidence established that (a) Procter's acquisition of Clorox did not have anticompetitive effects, and, (b) following the acquisition, Clorox under Procter ownership did not engage in anticompetitive acts that were made possible by the acquisition. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979).

2. Plaintiff is not entitled to recover on its claims for attempted monopolization under Section 2 of the Sherman Act because the preponderance of the evidence established that (a) Clorox under Procter ownership did not have an intent to monopolize, to injure or to inhibit competition or to destroy competitors, (b) there was no significant probability that Clorox would achieve a monopoly of liquid bleach, and (c) the conduct on the part of Clorox under Procter ownership of which

plaintiff complains consisted of legitimate business practices, was not anticompetitive, restrictive, exclusionary or predatory, and did not exclude or lessen competition. *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979); *Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

3. Plaintiff is not entitled to recover on its claims of monopolization under Section 2 of the Sherman Act because the preponderance of the evidence established that (a) Clorox under Procter ownership lacked the power to control price or to exclude competition in any relevant market for liquid bleach, (b) Clorox's market shares, both nationally and regionally, were not obtained by improper means but through business acumen and marketing skill, (c) Clorox did not use any power that it may have had in one regional market to gain an advantage in another market, and (d) the conduct of which plaintiff complains consisted of legitimate business practices, was not predatory, restrictive or preclusive, and did not have the purpose or effect of excluding any producer or potential producer from competing in the liquid bleach market. *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979); *Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

4. Even if Procter's acquisition of Clorox had anticompetitive effects, or the conduct of Clorox under Procter ownership was actionable under either Section 7 of the Clayton Act or Section 2 of the Sherman Act, plaintiff is not entitled to recover because the evidence fails to show that such effects or conduct were the cause of the injuries for which plaintiff seeks damages in this action. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979).

DATED: March 14, 1980.

/s/ WILLIAM P. GRAY

WILLIAM P. GRAY
United States District Judge

APPENDIX D

PUREX CORPORATION,
Plaintiff-Appellant,

v.

The PROCTER & GAMBLE COMPANY,
and the Clorox Company,
Defendants-Appellees.
No. 76-3205.

United States Court of Appeals,
Ninth Circuit.

May 11, 1979.

Appeal from the United States District Court for the Central District of California.

Before HUFSTEDLER and KILKENNY, Circuit Judges, and ENRIGHT,* District Judge.

HUFSTEDLER, Circuit Judge:

Purex Corporation ("Purex") appeals from a judgment in favor of The Procter & Gamble Company ("Procter") in an action by Purex seeking damages under Section 4 of the Clayton Act (15 U.S.C. § 15) for claimed violations of Section 7 of the Clayton Act (15 U.S.C. § 18) and Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). We vacate the judgment and remand to the district court for further consideration in the light of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701; *Greyhound Computer Corp. v. International Business Machines Corp.* (9th Cir. 1977) 559 F.2d 488, and for making new findings of fact following reconsideration of the controlling legal standards.

This litigation was spawned by the acquisition of Clorox Chemical Company ("Clorox") by Procter on August 1, 1957. At that time, Clorox was the nation's leading producer of liquid

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* Honorable William B. Enright, United States District Judge, Southern District of California, sitting by designation.

bleach and Procter was the nation's leading manufacturer of soaps, detergents, and other high-turnover household products. On September 20, 1957, the Federal Trade Commission ("FTC") challenged Procter's acquisition of Clorox on the grounds that it might substantially lessen competition or tend to create a monopoly in liquid bleach markets in violation of Section 7 of the Clayton Act. The FTC subsequently held that the acquisition violated Section 7, and Procter was ordered to divest itself of Clorox (63 F.T.C. 1465 (1963)). On April 11, 1967, the Supreme Court, reversing a decision of the Sixth Circuit (*Procter & Gamble Co. v. FTC* (6th Cir. 1966) 358 F.2d 74), affirmed the FTC order (*FTC v. Procter & Gamble Co.* (1967) 386 U.S. 568, 87 S.Ct. 1224, 18 L.Ed.2d 303). Divestiture was completed on January 2, 1969.

This case was filed on October 23, 1967. Purex, Clorox's closest competitor in the liquid bleach field, sued Procter pursuant to Section 4 of the Clayton Act, authorizing treble damages for anyone injured "by reason of anything forbidden in the antitrust laws." Purex claimed that its liquid bleach business had been damaged by the illegal acquisition and by an alleged conspiracy to restrain trade and to obtain a monopoly in violation of Sections 1 and 2 of the Sherman Act. After a court trial, judgment was for Procter. (*Purex Corp. v. Procter & Gamble Co.* (C.D.Cal.1976) 419 F.Supp. 931.)[1]

Procter's acquisition of Clorox was a violation of Section 7 of the Clayton Act because it could substantially lessen competition or tend to create a monopoly in the liquid bleach market. The Supreme Court explained why Procter's acquisition of Clorox might substantially lessen competition and tend to create a monopoly. The Court said that the relevant line of commerce was household liquid bleach, a distinctive product with no close substitutes. Because all liquid bleach is chemically identical, advertising and sales promotion are vital to successful marketing of the product. Liquid bleach cannot be shipped economically more than three hundred miles from its place of

[1] On appeal Purex does not challenge the judgment for Procter on the Sherman Act § 1 claim.

manufacture because of high shipping costs and low sales prices. Thus, the relevant geographic market for liquid bleach includes a series of regional markets, as well as the national market.

When Procter acquired Clorox, the liquid bleach industry was highly concentrated. Six firms accounted for almost 80 percent of national sales. Clorox, the only firm selling liquid bleach on a nationwide basis, was the dominant firm in the industry with 48.8 percent of all industry sales. Purex, Clorox's closest competitor, distributed liquid bleach in less than half of the national market. Purex accounted for 15.7 percent of industry sales at the time of acquisition. In certain regional markets, Clorox's "position approached monopoly proportions." (386 U.S. at 578, 87 S.Ct. 1224.) Clorox's seven principal competitors did no business in metropolitan New York, New England, or the mid-Atlantic states, where Clorox's market shares were 64 percent, 56 percent, and 72 percent, respectively.

The Supreme Court accepted the FTC's characterization of the acquisition of Clorox by Procter as a "product-extension merger" because the acquiring firm had not been a participant in the liquid bleach industry. Although Procter did not produce liquid bleach, it was the nation's leading producer of soaps, detergents, and other high-turnover household products when it acquired Clorox. Procter was the nation's largest advertiser and the most likely potential entrant into the liquid bleach industry.

Procter's acquisition was fraught with anti-competitive effects, the Supreme Court said, because:

> "(1) the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing; (2) the acquisition eliminates the potential competition of the acquiring firm."

(386 U.S. at 578, 87 S.Ct. at 1230.)

The Court thought it was reasonable to assume that the smaller producers of liquid bleach "would become more cautious in competing due to their fear of retaliation by Procter." (386 U.S. at 578, 87 S.Ct. at 1230.) Procter's enormous financial resources, its access to substantial advertising discounts, and its sophisticated marketing skill, could give Clorox competitive advantages and an enhanced capacity "to meet the short-term threat of a new entrant" in any of the markets it dominated. (386 U.S. at 579, 87 S.Ct. at 1230.) Moreover, the Court believed that the elimination of the threat of entry by Procter might enable Clorox to exercise greater market power throughout the liquid bleach industry. (386 U.S. at 580-81, 87 S.Ct. 1224.) The fact that the merger "might result in economies" was no defense, the Court explained, because Congress had "struck the balance in favor of protecting competition." (386 U.S. at 580, 87 S.Ct. at 1231.)

I

Purex sought to prove that Procter's acquisition of Clorox actually produced the kind of anti-competitive consequences that the Supreme Court feared. Purex charged that the acquisition had reduced competition in the industry because Clorox acquired access to the vast marketing resources of Proctor [*sic*], "including advertising discounts, preferred media positions, market research, packaging capability, and experienced personnel." Purex claimed that Procter and Clorox engaged in below-cost pricing, when Purex tested the feasibility of eastern expansion by attempting to market liquid bleach in Erie, Pennsylvania. Purex also alleged that Procter and Clorox implemented a comprehensive plan to direct marketing expenditures to weaken Purex in its areas of strength. In addition, Purex claimed that Procter and Clorox used a number of allegedly unfair commercial practices, including false advertising, bleach boarding, and participating in a cooperative marketing program with washing machine companies.

As we read the district court's opinion, the district court found that almost all of the specific instances of claimed anti-

competitive conduct that Purex alleged had actually occurred. (The district court did not make separate findings of fact and conclusions of law.) The district court nevertheless concluded that "Clorox under Procter was not anticompetitive," because "Clorox did nothing after the merger that it could not readily have done before the merger," and "the acts complained of amounted to no more than the vigorous competition that one would expect among rivals in the marketplace." (419 F.Supp. at 934, 937.)[2]

The district court did not find that the merger had no effect on Clorox's competitive position in the market. To the contrary, the district court found that Clorox obtained valuable managerial resources, technical services, and advertising discounts through Procter. It also found that the merger increased Clorox's efficiency, and therefore, its profits. Although it engaged in below-cost pricing after the acquisition, that conduct was merely "localized and temporary."

The pivot of the district court's determination that no forbidden anti-competitive results occurred was its finding that Clorox could have engaged in the same conduct with antitrust impunity before the merger took place. That assumption rests on a misreading of the Supreme Court's opinion in the *Procter & Gamble* case. In the Section 7-world, Davids can engage in many kinds of conduct in the marketplace that are forbidden to Goliaths.

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[2] The district court summarized its findings as follows:

"1. Clorox did nothing after the merger that it could not readily have done before the merger.

2. Pre-acquisition Clorox regularly did a better job in marketing liquid bleach than did Purex, and the same trend continued after the merger.

3. Clorox, under Procter, was not anticompetitive to any actionable extent under the antitrust laws.

4. The comparative inferiority of Purex in marketing liquid bleach stemmed principally from decisions of its own management, rather than having been imposed by Clorox.

5. The claim by Purex that its national expansion plans were frustrated by fear of Clorox, is an after-thought, induced by the contemplation of this litigation." (*Purex, supra*, 419 F.Supp. at 934.)

Clorox's position was significantly different before and after the acquisition. After the merger, even relatively innocuous competitive acts could become actionable if the impact of those acts reduced competition in the industry by raising entry barriers and by dissuading smaller firms from aggressive competition. The below-cost pricing, for example, could serve as a basis for damages even if it were both localized and temporary, if that conduct were related to an enhanced capacity "to meet the short-term threat of a new entrant" in any of the markets dominated after the merger. (386 U.S. at 579, 87 S.Ct. at 1230.)

A failure fully to appreciate the standards against which post-illegal merger conduct must be judged is surely understandable because, at the time the district court decided this case, it did not have the benefit of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* or *Greyhound Computer Corp., v. International Business Machines Corp., supra.*

Section 4 of the Clayton Act permits a treble-damage recovery by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." (15 U.S.C. § 15.) While Section 4 "is basically a remedial provision," Section 7 is "primarily a prophylactic measure." (*John Lenore & Co. v. Olympia Brewing Co.* (9th Cir. 1977) 550 F.2d 495, 498.) Section 7 prohibits acquisitions the effect of which "in any line of commerce in any section of the country . . . may be substantially to lessen competition, or to tend to create a monopoly." (15 U.S.C. §18.) Because the goal of Section 7 is "primarily to arrest apprehended consequences of intercorporate relationships before those relationships [can] work their evil" (*United States v. E. I. du Pont de Nemours & Co.* (1957) 353 U.S. 586, 597, 77 S.Ct. 872, 879, 1 L.Ed.2d 1057), a violation of Section 7 can be established without proving that the acquisition actually had anti-competitive effects. Proof alone that the merger produced anti-competitive effects, however, does not carry the Section 4 liability day for Purex. Purex also had to prove that the effects caused it actual antitrust injury. Proof of a Section 7 violation "establishes only

that injury may result." (*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra.*)[3]

When this case was before the district court, the Supreme Court had not yet decided whether treble damages could be recovered for Section 7 violations, although other courts had indicated that such recoveries were possible. (*E.g., Helix Milling Co. v. Terminal Flour Mills Co.* (9th Cir. 1975) 523 F.2d 1317, 1323; *Carlson Companies, Inc. v. Sperry & Hutchinson Co.* (8th Cir. 1974) 507 F.2d 959; *Gottesman v. General Motors Corp.* (2d Cir. 1969) 414 F.2d 956; *Dailey v. Quality School Plan, Inc.* (5th Cir. 1967) 380 F.2d 484.)[4] In line with these decisions, the district court held that a claim for damages under Section 4 of the Clayton Act could be based on a Section 7 violation, a holding subsequently approved by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701. But the district court lacked a clear standard for determining whether Purex was entitled to damages, because *Brunswick's* articulation of the damage recovery standard governing § 4—§ 7 actions was not available to it.

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[3] Because of the difficulty of "[i]ntermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms" (*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 486, 97 S.Ct. 690, 696, 50 L.Ed.2d 701), some courts initially rejected the notion that a treble damage claim under Section 4 could be based on a Section 7 violation. (*Dairy Foods, Inc. v. Farmers Co-op. Creamery* (D. Minn. 1969) 298 F.Supp. 774; *Bailey's Bakery, Ltd. v. Continental Baking Co.* (D.Hawaii 1964) 235 F.Supp. 705.) For a discussion of the divergent standards of recovery applied in § 4—§ 7 actions before *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701, see Note, Treble Damage Actions for Violations of Section 7 of the Clayton Act, 38 U.Chi.L.Rev. 404, 410-17 (1971).

[4] In *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.* (1965) 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405, the Supreme Court had held that the pendency of an FTC proceeding tolled the statute of limitations in a private treble damage action based on violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The Court did not expressly decide whether a treble damage action under Section 4 of the Clayton Act could be based on a Section 7 violation until *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701.

In *Brunswick*, the Supreme Court outlined, for the first time, the circumstances under which Section 4 damages could be recovered for acquisitions that violate Section 7. The Court began with the premise that damage recovery could not be based solely on proof of a Section 7 violation because such proof establishes only potential injury, and not actual injury. The Court then outlined the kind of actual injury that must be shown to recover for an illegal acquisition. The notion that all losses causally linked to an illegal acquisition are recoverable was rejected because it would permit recovery for some injuries the antitrust laws were not intended to redress. [5] Only injuries that "occur 'by reason of' that which made the acquisitions unlawful," give rise to damages under Section 4, the Court explained. (429 U.S. at 488, 97 S.Ct. at 697.) The standard to be applied is that plaintiffs:

> "must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. [100], at 125 [89 S.Ct. [1562], at 1577, 23 L.Ed.2d 129]." (*Brunswick, supra*, 429 U.S. at 489, 97 S.Ct. at 697 (footnote omitted).)

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[5] In *Brunswick, supra*, the owners of a group of bowling centers sought treble damages under Section 4 from a large bowling manufacturer that had acquired a group of competing bowling centers allegedly in violation of Section 7. The plaintiffs sought to recover damages for the increased profits they would have garnered if the acquisition had not prevented their competitors from going out of business. The Court held that these damages were not recoverable under Section 4 because they did not stem from an injury that the antitrust laws were intended to prevent. Moreover, the Court noted, it would be inimical to the purposes of the antitrust laws to award damages for an injury that flowed from the fact that competition had not been reduced because competitors were rescued before they went out of business. (429 U.S. at 487-88, 97 S.Ct. 690.)

Under *Brunswick*, Purex had to establish (1) that the acquisition had anti-competitive effects, or that anti-competitive acts made possible by the acquisition occurred, and (2) that Purex was injured as a result of those anti-competitive acts or effects.

From the findings of the district court, we are unable to conclude that the post-merger acts and conduct of Clorox, under Procter, were free from antitrust taint. We can infer that the acquisition affected competition, but we are unable to say how Clorox's conduct was affected, nor are we able to discern the respects, if any, by which those acts or conduct injured Purex. Part of our difficulty is that we are unable to disentangle the district court's findings of fact from its conclusions of law, and we are not able to determine the extent to which the district court's factual findings were predicated upon a misinterpretation of the legal standards governing Section 4 and Section 7 conduct and activities in a post-illegal merger case.

By way of illustration, the district court's finding that Clorox did nothing after the merger that it could not have done before the merger does not permit us to draw an inference that the acquisition of Clorox by Procter had no anti-competitive effects. The Supreme Court requires us to begin with the illegal merger and then to ask the question whether the acquisition had the effect of substantially lessening competition in the liquid bleach markets by raising entry barriers or by dissuading the smaller firms, such as Purex, from aggressively competing for fear of retaliation by Procter. The district court found that the acquisition made Clorox more efficient and gave it access to Procter's resources. Even if Clorox did not have to use the enhanced capabilities provided by Procter's "deep pocket," competition may have diminished and entry barriers may have increased simply because the acquisition created the threat to Purex that the "deep pocket" could be used.

The district court's conclusion to the contrary appears to have been based upon the assumption that Purex had to demonstrate that Procter and Clorox engaged in conduct independently violative of the antitrust laws in order to recover under Section 4 for the effects of an illegal acquisition. As we

have since learned from *Brunswick*, Purex had only to demonstrate that its injury occurred " 'by reason of' that which made the acquisitions unlawful." (429 U.S. at 488, 97 S.Ct. at 697.) The district court's finding that the conduct of Procter and Clorox "amounted to no more than the vigorous competition" fails to take into account the fact that the quality of conduct allegedly flowing from an illegal acquisition must be judged by reference to the reasons for the acquisition's illegality. Conduct otherwise unquestionable under the antitrust laws, may provide a basis for antitrust liability when employed by a dominant firm to lessen competition. (*Greyhound Computer Corp. v. International Business Machines Corp., supra*, 559 F.2d 488, 498; *Industrial Building Materials, Inc. v. Interchemical Corp.* (9th Cir. 1971) 437 F.2d 1336, 1344-45.) For instance, Procter's acquisition may have increased Clorox's efficiency, as the district court found, by enhancing Clorox's marketing resources and by making substantial advertising discounts available. Although such economies may be unobjectionable in isolation, they may be the basis of Section 4 liability if they serve as part of the mechanism by which an illegal merger lessens competition.[6]

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[6] The district court rejected Purex's "claim that it should be entitled to damages because fear of the combination of Procter and Clorox discouraged Purex from competing vigorously." The court reasoned that recovery for such a claim would reward "the fainthearted" and encourage a competitor to "simulate an attitude of fear and do nothing in the hope of recovering damages for loss of profits that he would have refrained from trying to earn." (*Purex, supra*, 419 F.Supp. at 948, 949.) This conclusion conflicts with the teaching of *Brunswick* that it is important to consider why an acquisition violates Section 7 in order to determine what effects of the acquisition give rise to damages under Section 4. (429 U.S. at 488, 489, 97 S.Ct. 690.) The Supreme Court indicated that one of the reasons the acquisition was illegal was because it might induce competitors to "become more cautious in competing due to their fear of retaliation by Procter." (386 U.S. at 578, 87 S.Ct. at 1230.) If Purex can prove that it suffered injury because of the anticompetitive effect of fear of retaliation by Procter, then Purex may be entitled to damages under Section 4. Of course, Purex must prove injury in fact and Purex cannot recover for profits that would never have been earned even if the acquisition had not occurred.

The district court's failure to appraise the legality of Clorox's and Procter's conduct in the context of the reasons for the acquisition's illegality is illustrated by its treatment of the Erie incident. In October, 1957, Purex sought to market liquid bleach in Erie, Pennsylvania, where it had previously not sold bleach and where Clorox dominated the market. Purex engaged in heavy promotional spending which helped it quickly to obtain broad distribution and more than 30 percent of the Erie market. Clorox responded with massive promotional spending of its own (90 cents per case of bleach on which a profit of 40 cents had normally been made). Purex rapidly lost market share and eventually withdrew from the Erie market. The district court said that there was "nothing reprehensible or anticompetitive in the Clorox response in Erie." (*Purex, supra,* 419 F.Supp. at 941.)

The district court erred in assuming that practices that might not be anti-competitive in isolation could properly be used by the dominant firm in a market in response to a threat of entry. (*See Greyhound Computer Corp. v. IBM Corp., supra; Industrial Building Materials, Inc. v. Interchemical Corp., supra. See also* Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697, 728-29 (concluding that " 'excessive' promotional spending" by a dominant firm should normally be deemed predatory when its timing coincides with the appearance of a new entrant).) As the Supreme Court recognized in *Brunswick,* Section 4 recoveries can be based on behavior that may not be anti-competitive in the short run. "The short term effect of certain anti-competitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened." (*Brunswick, supra,* 429 U.S. at 489 n.14, 97 S.Ct. at 698.) If the Erie experience reflects the fact that the acquisition increased entry barriers in the markets Clorox dominated (*cf. FTC v. Procter & Gamble Co., supra,* 386 U.S. at 579 n.3, 87 S.Ct. 1224), then Purex may establish Section 4 liability for injuries traceable to Clorox's conduct.

Because the district court did not have the benefit of *Brunswick*, the district court's findings do not reveal whether the acquisition of Clorox by Procter produced anti-competitive effects or inspired anti-competitive conduct. On remand, the district court should reconsider this question in light of *Brunswick* and *Greyhound*. [7]

Even if Procter's acquisition of Clorox had anti-competitive consequences, Purex cannot recover under Section 4 unless it established that if suffered injury from the acquisition's anti-competitive effects. (*Brunswick*, *supra*, 429 U.S. at 488-89, 97 S.Ct. 690; Areeda, Antitrust Violations without Damage Recoveries, 89 Harv.L. Rev. 1127 (1976).)

Some of the district court's findings suggest that Purex was not able to prove that it suffered very much damage flowing from the illegal merger. But, assuming, *arguendo*, that the district court's factual findings in this respect are fully supported by the evidence, we cannot conclude from the record that Purex suffered no damage at all. Thus, for example, the district court found that before the acquisition Clorox had done a better job of marketing liquid bleach than Purex and that Purex's comparative marketing inferiority was the result of Purex's management decisions that were unrelated to the conduct of Procter and Clorox. From that finding, however, it does not follow that none of Purex's inferior market positions were attributable to the claimed Section 7 violations.

By way of further example, the district court found that Purex's national expansion plans were "an afterthought, induced by the contemplation of this litigation." (*Purex*, *supra*, 419 F.Supp. at 934.) We are unable to decide in the present

[7] We recognize that some of the district court's findings of fact, if not clearly erroneous, would preclude Purex from recovery premised on certain of Clorox's practices. "However, in view of the fundamental nature of the error here, we think that the district court should be given the opportunity to reconsider the evidence before it in the light of our" interpretation of the legal standard. (*Cf. Gottesman v. General Motors Corp.* (2d Cir. 1969) 414 F.2d 956, 961.) While we do not order a new trial on remand, the district court is not foreclosed from hearing additional evidence on some of the issues in the case.

state of the record whether that finding is supported by the evidence or by the correct legal standard. It is evident from the district court's opinion that it rested this conclusion, in part, on the fact that Purex, after Erie, continued to pursue eastern expansion by acquiring the John Puhl Division of Sterling Drug, Inc. However, if the evidence showed that the Erie experience either entirely foreclosed the possibility of expansion by internal growth or rendered that potential economically impracticable, Purex may have proved that it suffered loss because expansion by acquisition was made more costly than internal expansion.[8]

Because each of the factual findings is intertwined with the legal premises and the legal conclusions, we are unable to separate them. In this state of the record, it would be futile for us to cull the evidence to determine whether the factual findings are supported by the evidence. A remand is necessary to determine whether Purex suffered any compensable injury, upon applying the controlling legal standards. (*Cf. Gottesman v. General Motors Corp., supra,* 414 F.2d at 961.)

II

SHERMAN ACT SECTION 2 CLAIM

Purex also charged that the conduct of Procter and Clorox violated Section 2 of the Sherman Act (15 U.S.C. § 2.)[9] Purex sought treble damages on the grounds that Procter and Clorox had attempted to monopolize, and had in fact monopolized, the

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[8] For example, the district court found that at the time Purex attempted to enter the Erie market, John Puhl, could have been acquired for $3 million. In October, 1958, after Purex had been forced to withdraw from Erie, the acquisition was completed for a price of $4 million. (*Purex, supra,* 419 F. Supp. at 946.)

[9] Section 2 of the Sherman Act provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." (15 U.S.C. § 2.)

production and sale of liquid bleach in various markets. The district court apparently believed that its findings with respect to the claim founded on the violation of Clayton Act Section 7 precluded a finding of monopolization or an attempt to monopolize, because it rejected Purex's Section 2 claim without discussion of the applicable legal standards.

In order to prove monopolization in violation of Section 2 of the Sherman Act, a plaintiff must establish: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." (*United States v. Grinnell Corp.* (1966) 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778.) Proof of an attempt to monopolize in violation of Section 2 requires three elements: "(1) specific intent to control prices or destroy competition with respect to a part of commerce, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success." (*Gough v. Rossmore Corp.* (9th Cir. 1978) 585 F.2d 381, 390; *Janich Bros., Inc. v. American Distilling Co.* (9th Cir. 1977) 570 F.2d 848, 853.)

The district court made no findings with respect to the relevant markets or the market shares possessed by Clorox, although Purex presented substantial evidence on these issues. The Supreme Court had previously held that the relevant geographic market for liquid bleach was a national market and a series of regional markets. The Court had observed that "Clorox enjoyed a dominant position nationally, and its position approached monopoly proportions in certain areas." (*FTC v. Procter & Gamble Co., supra,* 386 U.S. at 578, 87 S.Ct. at 1230.) Purex attempted to demonstrate that Clorox's market shares had actually increased in subsequent years. The district court's observation that "the liquid bleach business is hardly conducive to monopoly," fails to take into account the evidence of Clorox's enormous market shares in certain regional markets. Moreover the district court's finding that many small firms prospered in local areas does not preclude the possibility of

monopolization of liquid bleach, as the Supreme Court recognized in *FTC v. Procter & Gamble Co., supra,* 386 U.S. at 578, 87 S.Ct. 1224.

The district court apparently thought that the conduct of Procter and Clorox was not actionable under Section 2 because of its previous holding that it "amounted to no more than the vigorous competition that one would expect among rivals in the marketplace." (*Purex, supra,* 419 F.Supp. at 937.) The district court did not have the benefit of *Greyhound Computer Corp. v. IBM Corp., supra,* when it reached this conclusion. In *Greyhound,* this court recognized that "otherwise lawful practices that unnecessarily excluded competition" could be actionable under Section 2 of the Sherman Act when used by the dominant firm in an industry. (559 F.2d at 498.) Thus, it is important to consider the context in which conduct occurs when assessing its anti-competitive quality. (*See Industrial Building Materials, Inc. v. Interchemical Corp., supra,* 437 F.2d at 1344-45.) The district court's findings are insufficient for us to determine whether the Section 2 claim was properly rejected, because they fail to take into account the dominant position of Clorox in various markets. Thus, we must remand the Section 2 claim to the district court for further findings consistent with our decision in *Greyhound.*

The judgment is vacated and the cause is remanded to the district court for further proceedings as the district court may direct consistently with the views herein expressed.

ENRIGHT, District Judge, concurring:

I would concur only insofar that the cause is remanded to the trial court for further findings and reconsideration in light of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) and *Greyhound Computer v. Inter. Business Machines,* 559 F.2d 488 (9th Cir. 1977). The trial court essentially found in its detailed Memorandum Decision that there was no nexus between the activities of the defendant and the alleged injury to the plaintiff. Such reconsideration may or may not require a different result. As is often the case in protracted litigation (this case has been

actively pursued in the trial court since 1967), several significant cases have been decided since the trial court made its decision. The trial court should have the opportunity to review the matter anew and we, of course, would benefit from such evaluation. It is my view that the trial court would be free, but not obligated, to undertake further proceedings if such would assist that determination.

APPENDIX E

PUREX CORPORATION, LTD., a corporation, Plaintiff,

v.

The PROCTER & GAMBLE COMPANY, a corporation, and the Clorox Company, a corporation, Defendants.

Civ. No. 67-1546-WPG.

United States District Court,
C. D. California.

July 23, 1976.

MEMORANDUM OF DECISION

GRAY, District Judge.

The present action is for treble damages of more than five hundred million dollars, sought pursuant to section 4 of the Clayton Act (15 U.S.C. § 15) and arising out of the acquisition (in August 1957) and retention (until January 1969) by defendant Procter & Gamble (Procter) of the Clorox Chemical Company, the alleged effect of which has been "substantially to lessen competition . . . [and] to tend to create a monopoly," in violation of section 7 of the Clayton Act (15 U.S.C. § 18). The complaint also charges Procter and defendant Clorox Company (Procter's wholly owned subsidiary to whom the assets of the acquired company were transferred) with conspiracy to restrain trade and to obtain a monopoly in interstate commerce in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

This matter has been fully briefed and tried to the court without a jury, and the court has received and studied the post-trial memoranda submitted by the parties. For reasons hereinafter set forth, judgment will be for the defendants.

Procter is a large and nationally well known manufacturer of soaps, detergents and other high-turnover household products sold principally through grocery stores. On August 1, 1957, Procter acquired the assets of the Clorox Chemical Company, which, at that time, was the nation's leading manufacturer of household liquid bleach, having a market share of about 49%, with annual sales of almost $40,000,000. Purex, the present plaintiff, with a market share of 15.7%, was the closest competitor of Clorox for the liquid bleach market.

On September 30, 1957, the Federal Trade Commission instituted proceedings which challenged the above-mentioned acquisition as having been in violation of section 7. On November 26, 1963, the Commission ruled that such violation had occurred and ordered that Procter divest itself of Clorox (63 F.T.C. 1465). On April 10, 1967, the Supreme Court affirmed the Commission order (386 U.S. 568), and the divestment was completed on January 2, 1969.

The present action, which was filed on October 23, 1967, is based principally upon the proposition that: (a) the acquisition violated the antitrust laws, as the decision by the Supreme Court finally determined; (b) the plaintiff was damaged as a result of the acquisition; and (c) the plaintiff is entitled to relief under section 4 of the Clayton Act (15 U.S.C. § 15) which provides that "Any person who shall be injured in his business ... by reason of anything forbidden in the antitrust laws may ... recover threefold the damages by him sustained ...."

The threshold question is whether or not an infringement of section 7 is the type of antitrust violation that justifies a claim for damages under section 4. Procter was adjudged to have violated the antitrust laws in having acquired Clorox because, in the words of section 7, the effect of such acquisition " ... *may be* substantially to lessen competition, or to *tend* to create a monopoly." (Emphasis supplied.)

Thus, the fact of the section 7 violation, which Procter does not challenge in these proceedings, is no proof whatever that the acquisition *did* lessen competition or *did* tend to create a monopoly or *did* injure the plaintiff in any way. Section 7

speaks only as of the time of the acquisition, and a violation is determined to exist only because of a prediction as to what might happen as a result thereof.

The Ninth Circuit appears not to have passed directly upon the question of whether an acquisition adjudged to be contrary to section 7 constitutes an antitrust violation of a type that would warrant an action for damages under section 4.[1] However, an affirmative answer is found in a well-reasoned opinion in *Gottesman v. General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969). Judge Feinberg, in speaking for the court, adverted to the fact that an adjudication of a section 7 violation establishes only that the harm of substantially lessened competition and a tendency toward monopoly is threatened, not that it occurred. He then stated:

> "But if the threat ripens into reality we do not see why there can never be a private cause of action for damages. If section 7 is designed to prevent acquisitions that 'may' or 'tend to' cause specified harm, such an acquisition may either itself directly bring about the harm or make possible acts that do. We do not say that a section 7 violation must, or even probably will, have that result; but that it may and that plaintiffs should have a chance to prove injury 'by reason of' the violation are persuasive propositions." 414 F.2d at 961.

A similar analysis and result are contained in *Carlson Companies, Inc. v. Sperry & Hutchinson Co.*, 507 F.2d 959 (8th Cir. 1974).

Following the lead of *Gottesman*, the present case was tried by this court on the basis that the plaintiff "should have a

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[1] Tacit Ninth Circuit approval of the concept of basing a section 4 damage action upon a section 7 violation may be inferred from the opinion resolving an interlocutory appeal in these proceedings (453 F.2d 288 (9th Cir. 1971)). There, the Court of Appeals unheld this court in its determination that the plaintiff was entitled to have the divestment order by the Federal Trade Commission, as affirmed by the Supreme Court, received at the trial of this action as *prima facie* evidence that Procter's acquisition of Clorox violated the antitrust laws.

chance to prove injury 'by reason of' the violation . . . " of the antitrust laws committed by Procter in having acquired Clorox. However, in the opinion of this court, the plaintiff simply was unable to show that it suffered any damage that is chargeable to such acquisition.

From the many witnesses and the welter of documentary evidence received in this case, the following conclusions were impelled which, individually and collectively, preclude an award to the plaintiff:

1. Clorox did nothing after the merger that it could not readily have done before the merger.

2. Pre-acquisition Clorox regularly did a better job in marketing liquid bleach than did Purex, and the same trend continued after the merger.

3. Clorox, under Procter, was not anticompetitive to any actionable extent under the antitrust laws.

4. The comparative inferiority of Purex in marketing liquid bleach stemmed principally from decisions of its own management, rather than having been imposed by Clorox.

5. The claim by Purex that its national expansion plans were frustrated by fear of Clorox, is an after-thought, induced by the contemplation of this litigation.

There follows in this memorandum a discussion of the principal bases for these conclusion.

I. CLOROX DID NOTHING AFTER THE MERGER THAT IT COULD NOT READILY HAVE DONE BEFORE THE MERGER.

A. *Financial Resources.* In concluding that the retention of Clorox by Procter would be potentially anticompetitive, Commissioner Elman, in speaking for the Federal Trade Commission, expressed the concern that Procter's larger financial resources might be used to overwhelm competition by financing expensive sales promotions or "in a price fight to the finish." (63 F.T.C. 1465, 1566-7). Nothing like that happened. Procter did not dip into its "deep pockets" for the benefit of

Clorox. Sales promotions were financed strictly out of proceeds from the sales of liquid bleach, just as they had been prior to the merger. With a few localized and temporary exceptions, Clorox never did cut its prices below cost.

In other words, none of the actions of Clorox during the retention period here concerned were dependent upon financial help from Procter. The money flow was entirely the other way, in form of profits going to the parent company.

B. *Independent Operation.* Clorox was administered by its own personnel after acquisition, in much the same manner as before. As soon as Procter gained control, one of its senior executives, Fred Brown, was designated to take charge of Clorox as executive vice president. He moved to Oakland, California, where the headquarters of that company were located, and he brought with him two principal assistants who also had come up through the ranks at Procter. Over the years, Clorox hired several other employees from Procter to fill assignments for which their well-established skills uniquely qualified them. Procter management traditionally has been considered to be very enlightened in the field of manufacturing and marketing household products. Doubtless, Mr. Brown and his associates that came from Procter had acquired valuable expertise in the course of their years with that company, and, as the record shows, they served Clorox very well. However, it could hardly be argued that Procter was the only source from which Clorox could have obtained competent management personnel.

Mr. Howard Morgens, then the chief executive officer of Procter, also held the title of president of Clorox. He testified that the attitude of Procter toward Clorox at the time of the merger was that it had been remarkably successful, having grown as rapidly as Procter; and that it should be permitted to continue to operate as a separate entity in substantially the same manner as before. The record indicates that this attitude generally was adhered to throughout the period of acquisition. Mr. Brown was in frequent contact with Mr. Morgens to keep the latter informed as to what Clorox was doing, and in the

course of the years, some advice and direction were given and some restrictions imposed. However, for the most part, local Clorox management was "given its head"; its basic policies remained the same; and, apart from increased expertise in some areas, it was little different after the acquisition than before.

C. *Use of Procter's Technical Services.* Procter had within its organization separate departments whose sole function was to discover and develop better ways of accomplishing the many aspects of producing and marketing its various products. These departments provided technical services in areas of market research, media studies for advertising, package and label design, product development, engineering assistance and others. As a member of the Procter "family," Clorox was entitled to these services and did use them to some considerable extent. However, Clorox was charged for all of such services. These charges and payments were presumably limited to bookkeeping transactions, but they reduced the "profits" of Clorox in the same manner as did other expenses, a fact that regularly was taken into account in determining whether to use a particular service. Of course, throughout the period of the merger (as well as at all other current times), comparable services were available for hire from sources unrelated to Procter and were used by Purex as well as by Clorox. The services that Procter afforded to Clorox doubtless were very good; how they compared with the services that were available to Purex and otherwise available to Clorox is a matter of conjecture and presumably varied greatly from instance to instance. Whatever differences there may have been can hardly constitute any part of a foundation for a damage claim.

D. *The Clorox Broker Organization.* Another concern expressed by Commissioner Elman as a reason for the divestment order, was the possibility that Procter might use its own direct sales force in the marketing of Clorox liquid bleach, with resulting promotional advantages to that product. (63 F.T.C. 1465, 1565). This anticipation, also, did not materialize. Prior to the merger, Clorox distributed its bleach to retailers by means of a network of independent brokers. The same system was used after the merger and remained under the direct control of the same Clorox official, Bernard Trimpe.

E. *Television Advertising Costs.* Commissioner Elman also felt that the merger of Clorox, a single product firm, with Procter, a very large, multi-product organization, would be likely to give undue enhancement to Clorox's competitive position through substantial cost savings in television advertising. (63 F.T.C. 1465, 1563).

It is true that discount rates available for local "spot" advertising favor the large advertiser. Clorox, as a part of Procter, was accordingly granted larger discounts than would have been available to Clorox alone. However, policies of Procter precluded Clorox from negotiating for additional "off-card" discounts that it might otherwise have obtained. Although these two offsetting circumstances doubtless resulted in a net gain to Clorox, the record does not show its extent. In any event, Clorox had ample funds with which to pay for the advertising that it chose to purchase, irrespective of the discounts, and the matter of such discounts is not shown to have played a substantial part in its advertising policies.

The plaintiff, also, received substantial discounts, and, unlike Clorox after the merger, the plaintiff sought and received special "off-card" discounts. There was no suggestion in the record that the discount rates earned by Clorox had any impact upon the nature or the quantity of the advertising program envisaged, adopted or maintained by the plaintiff.

Under the rule suggested in *Gottesman* and followed by this court, in order for the plaintiff to recover damages on the basis of a section 7 violation, it must establish that the acquisition did actually bring about the harm to the plaintiff or make possible acts that caused such harm (see *supra*, page 934). As the foregoing discussion shows, Clorox operated in largely the same manner after the merger as it did before, and the vast resources of Procter were not used to give Clorox capabilities that previously were unavailable to it. Under these circumstances, the necessary causal connection between the acquisition and any harm to the plaintiff is simply lacking.

The record does clearly show that the merger was largely responsible for an increase in Clorox's efficiency, which doubtless was reflected in its profits. This is hardly a basis for

criticism in this action, inasmuch as "competition based on efficiency is a positive value that the antitrust laws strive to protect." *Connell Construction Company v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 at 623, 95 S.Ct. 1830, 44 L.Ed.2d 418 at 426 (1975).

However, even such increased efficiency does not represent a change, insofar as the pre-merger and post-merger relationships between Clorox and Purex are concerned, as we now discuss.

II. PRE-ACQUISITION CLOROX REGULARLY DID A BETTER JOB IN MARKETING LIQUID BLEACH THAN DID PUREX, AND THE SAME TREND CONTINUED AFTER THE MERGER.

In this litigation, the plaintiff seeks to characterize pre-merger Clorox as a competitor whose passive and benign attitude was "live and let live." The plaintiff then complains that after the merger Clorox suddenly became highly aggressive and fought successfully to increase its share of the liquid bleach market at the expense of Purex. According to the plaintiff, such a change in attitude and practice was one of the results of the merger; and that since the merger was determined to have been in violation of the antitrust laws, the plaintiff is entitled to recover damages equal to all reductions in its profits that can be attributed to the awakening of its adversary.

Putting aside for the time being this somewhat startling conclusion, the record simply does not support the premise that the acquisition marked a substantial change in the competitive relationships between the two rivals.

Ever since the end of World War II, Clorox has been more successful in marketing liquid bleach than has the plaintiff. Well before the merger, Purex officials were thoroughly aware of this trend and regularly expressed concern. For example, a forty-page memorandum, prepared some time in 1956 to aid in planning the Purex 1957 advertising program, begins by reciting that "Purex has increased its liquid bleach sales 10% since 1952 (equal to the population increase), but Clorox has

increased 46%, 'all others' 25%. In Purex territories, Clorox is weaker, increasing only 38%—but 'all others' increased 31% against the Purex 10%." On July 6, 1955, a senior Purex official expressed concern about the tendency for Clorox "to be regarded as generic for bleach." (Exhibit 1614, page 3). And a memorandum of a conference attended by several Purex executives on December 15, 1955, states: "Facing the fact that Clorox, with heavy advertising expenditures, continues to steal business from Purex, it was agreed that imagination must be applied to our marketing concept and that Purex must be made to stand out attractively as a more desirable product on the retail shelves." (Exhibit Q, page 2).

The Purex share of the combined Purex-Clorox sales in the regions of the United States where Purex was doing business declined from about 58% in 1946 to about 46% at the time of the acquisition in 1957. Thereafter, the Purex comparative percentage figure kept going down at substantially the same rate until it reached about 33% when the divestiture was completed at the beginning of 1969. (Exhibit 1650, Table 4F). As might be expected, the graphic line of descent was not exactly straight. (Exhibit ATA). On the contrary, it showed occasional short-lived tendencies to level off. One of these brief pauses occurred in 1955 and 1956, about a year before the merger. The plaintiff insists that this shows that Purex finally had solved the problem of competing with Clorox, and that the resumption of the decline in its percent of the combined sales was attributable to the acquisition.

I can find nothing in the record to support the plaintiff's conclusion. The graphic line of descent shows that other temporary plateaus, even upswings, occurred in 1960 and 1966, well after the merger, and it appears that they and the leveling off in 1955-56 were no more than pauses in the downward trend that had marked the plaintiff's record of competition with Clorox ever since World War II.

III. CLOROX UNDER PROCTER WAS NOT ANTI-COMPETITIVE.

The plaintiff complains that after the merger, Clorox engaged in a series of predatory practices directed towards

Purex which frustrated the latter's ability adequately to compete. As had been discussed earlier in this opinion (see section I, *supra*), anything that Clorox did after the merger it had the full capability to do before. Under these circumstances, even if the acts complained of were to be considered anticompetitive, I do not see how they can be charged to the acquisition and made the basis of a damage claim under the antitrust laws. Be that as it may, the showing made by the plaintiff indicates to this court that the acts complained of amounted to no more than the vigorous competition that one would expect among rivals in the marketplace.

A. *Marketing Expenditures.* The plaintiff complains that Clorox developed a special fund from which it spent money for increased advertising and promotion in Purex's strong market areas, particularly Southern California, in order to keep Purex so busy there that it would not be able to compete with Clorox in other areas.

From the outset of the acquisition, Clorox did divide its market areas into three classifications: those where it was strong; those where it was relatively even with the competition, including Purex; and those where it was relatively weak. Clorox thereupon set out to improve its condition in all three categories of market areas. It sought to strike a balance between the principle of "spending your money where your business is," and the equally valid principle of using earnings from strong markets to "beef up" advertising and promotions in the problem areas or "targets of opportunity."

Southern California was an area in which Clorox sought to catch up with Purex, and it spent more money in advertising and promotions there than it did in other areas. I am not certain whether it siphoned funds from profits earned elsewhere in order to do so, but the record does not show that it made sales below cost in any area as a result of increased advertising expenditures.

A definitive Purex memorandum setting forth the plans for its liquid bleach for fiscal year 1963 states:

"Liquid Bleach brand strategy will be:

* * * * * *

> "7. Sales promotion dollars should be used in selected opportunity or problem markets. Criteria to determine these markets will include competitive conditions, commodity volume, profit potential, share and/or distribution opportunity, product availability, etc." (Exhibit AJ, page 1).

This would appear to indicate that Purex adopted the very same policy with which it now charges Clorox. In any event, I see nothing wrong in a competitor trying to overcome its "problem markets" by increasing expenditures for advertising, whether the money used is from local profits or imported funds from more profitable areas.

B. *Bleach Boards.* Store proprietors that sell liquid bleach usually display it in the familiar frame-like structures, called "gondolas," that form the interior aisles of the super markets. The gondolas contain adjustable shelves that are spaced according to the height of the merchandise stocked thereon. All liquid bleach normally is displayed in the same gondola, each brand being given at least one frontal position, or "facing," for each size, the numbers of additional facings being dependent upon the judgment of the store management as to how relatively fast-moving the item is. The more facings a brand has, the more likely it is that the "billboard" effect of the successive rows of bottles will catch the eye of the shopper, and the increased number of bottles will lessen the likelihood of the supply becoming fully depleted before the management gets around to replenishing it. Naturally, each distributor of grocery products tries to get as many facings as he can persuade the store manager to accord him.

Shortly after the acquisition, the brokers of Clorox began proposing to the store managers that they allow them to remove the shelves of the liquid bleach gondolas and stack the bottles solidly from bottom to top, giving stability to the pile by using flat plywood boards to divide the top of one layer from the bottom of the next. This manner of displaying the bleach increased substantially the number of bottles that the gondola could hold, thus lessening the likelihood of an "out of stock" condition. It also enhanced the "billboard" effect which made the display more appealingly noticeable to the customers.

These circumstances, plus the willingness of the Clorox brokers to furnish the boards and do the physical work involved in the adjustment, caused many store managers to react favorably to the idea, and "bleach boarding" appeared in many stores.

Of course, it was necessary to cut the boards into sizes that would correspond to the numbers of facings accorded the respective brands, and, inasmuch as the Clorox brokers brought their own saws and did the cutting, it is hardly likely that they would discriminate against their own product in proposing an allocation of facings. It may also be assumed that a store owner, impressed with the initiative and industry displayed and the valuable service rendered by the Clorox representative, would be likely to resolve in his favor a close decision of who gets a particular facing.

The practice of "boarding" came early to the attention of the plaintiff, and its response was equivocal and varied. Some of the Purex representatives were instructed to complain to the store owners about the boarding and to try to get them to discontinue the practice. Other Purex salesmen were told that they could offer to put in boards if they felt that they had to do so, but they were encouraged not to engage in the practice generally. For the most part, Purex did nothing about the matter.

Much of the plaintiff's case at the trial was devoted to complaining about the unfairness of bleach boarding and of the harm that such a practice caused to its business. One Purex salesman testified that Clorox, through its broker representatives with their boards and saws, "went through the market like a whirlwind." Another contended that, because of the boarding, Purex was "locked in," as far as being able to get more shelf space for its own promotions was concerned, and that in some instances Clorox obtained and held facings that were not justified by the comparative movement of its bleach. It is thoroughly understandable that Clorox may have gained an occasional facing from Purex because the hand that held the saw belonged to the former. However, the entire matter of whether a store would accept a bleach boarding program and,

if so, how the space in the gondola should be divided, was under the control of the retailer. His objective would be to adopt the system that he felt would sell the most bleach and to allocate the space among all brands sold by the store in accordance with the "movement" of the respective items. Bearing such motivation in mind, I have grave doubt that instances of unjust or unreasonable curtailment of Purex facings because of the Clorox boarding program were very widespread. This doubt is given support by a Purex inter-office memorandum dated June 2, 1965, which discussed the results of a "liquid bleach shelf exposure" study, performed by A. C. Nielsen Company, for a year ending in March 1965. The memorandum stated one of its "observations" to be that "Purex shelf facings remained relatively unchanged within each of the Purex regions and very favorable as compared with sales shares." (Exhibit V, page 2).

Because the plaintiff has complained so insistently about "boarding" throughout this litigation, I have pondered long and hard in trying to understand how such conduct could be considered predatory. The attempt has been unavailing. It seems to me that the program constitutes an instance of enlightened service to the store owners and to the bleach industry as a whole. Any competitive advantage that Clorox may have gained thereby stems from commendable initiative in an area of fair competition.

C. *Advertising Reference To "Weak Bleaches."* Some time after the merger, Clorox began to advertise the claim that Clorox gets out dirt better than do "weak bleaches." The plaintiff now infers and complains that the asserted comparison was directed against its liquid bleach and cries "foul," inasmuch as the chemical content of all liquid bleaches is substantially the same (or was until Purex introduced its more concentrated 6% bleach).

Clorox responds that its advertisement was directed at dry bleaches, which are demonstrably weaker, and it also justifies its advertising by claiming that because of the relatively rapid shelf turnover that Clorox enjoys, there usually is less time for it

to deteriorate before being sold and is therefore likely to reach the housewife at higher strength than do slower moving bleaches.

Clorox also contends that, although it had no intention to imply that Purex was a "weak bleach," the plaintiff may have permitted such an inference to develop in the mind of the housewife by referring to its bleach as "mild" and "gentle."

If all liquid bleaches are chemically the same, the comparative culpability between one manufacturer advertising his product as "strong" and the other touting his as "gentle" is not readily apparent. In any event, the matter of whether such advertising is permissible may be of interest to the Federal Trade Commission, under section 5 of the Federal Trade Commission Act (15 U.S.C. § 45); it is hardly a material, or even relevant, consideration in a multi-million dollar antitrust suit. See, *Holloway v. Bristol-Myers Corporation,* 158 U.S.App.D.C. 207, 485 F.2d 986, 989 (1973).

D. *The Litmus Test.* Despite the substantial chemical similarity among all liquid bleaches, Clorox's product apparently did have a relatively somewhat lower pH, or alkalinity, factor. The defendant discovered that this quality caused Clorox to turn litmus paper white a bit more rapidly than did other brands. Clorox thereupon prepared demonstration kits that it furnished to some of its broker representatives, along with an instruction sheet that showed them how to prove to the trade that Clorox was stronger and faster-working that [*sic*] Purex and the other liquid bleaches. One of the printed instructions cautioned, "do not leave both samples on the table or in view, as both will eventually turn the same color." The demonstrations apparently were conducted several times in about 1964-65 for the "education" of the retail trade, but they were not directed toward consumers.

Purex responded with a litmus test of its own that was designed to expose the "fraud" of the Clorox demonstration. The Purex assessment of these competitive demonstrations at about the time they were occurring is set out in the final

paragraph of a memorandum written by one of its principal executives on November 15, 1965:

> "It is doubtful the CLOROX demonstration will have had a great impact upon the trade. They have tried it before in other Purex markets with no success! Last year in Los Angeles, for example, we found that we were very effective in turning the tables on them by explaining to the trade what the actual demonstration represented. When we conducted our own demonstration and proved to them that the conclusions reached by CLOROX were untrue, we found many of the customers were upset with their CLOROX representatives. We felt that our own demonstration was quite effective on scoring a slight advantage over CLOROX and in a very short time CLOROX stopped using their demonstration." (Exhibit W).

On the whole, this seems to be a rather good analysis, and the matter of the battle of the litmus tests will be given no further consideration in this litigation.

E. *The "Thrashing" at Erie.* In October 1957, Purex undertook to establish its liquid bleach in the retail grocery stores of Erie, Pennsylvania, where it had not previously been operating and where Clorox was well entrenched. From the outset, Purex spent in the Erie market, in advertising and coupon discounts, over $3.00 per case sold, as compared with its normal rate of less than six cents. As a result, Purex obtained initially almost complete distribution for its product among the stores of Erie and a market share of more than 30%.

Clorox promptly responded with advertising and promotion expenditures of its own, totaling about ninety cents per case, which were principally in the form of price reductions of from three to seven cents, depending upon the size of the bottle, and the sale of ironing board covers and damping bags at minimal prices upon presentation of a Clorox label. The normal profit to Clorox per case is about forty cents. One of the plaintiff's contemporaneous documents asserts that the total

Purex advertising and promotional expenditures in the Erie test market during the five months following entry were $21,717.00, as against $6,527.00 spent by Clorox. (Exhibit BX).

The Purex share of the market in Erie soon went down to about 10% and remained at approximately that level until Purex withdrew from that area, in about March 1959.

Purex now refers to the response by Clorox to its entry into Erie as a "thrashing," and as an anticompetitive predatory practice designed to prevent a new competitor from getting a foothold in that market. The plaintiff, through its expert witnesses, contends that Clorox, because of its dominant position, had an obligation to give Purex, a newcomer, an opportunity to get established in Erie before responding to the challenge. Just how long Clorox should have had to wait, and what competitive steps it then might properly have taken in order to preserve or regain its market share, are not suggested.

In his opinion upon which the divestment order here concerned was based, Commissioner Elman considered at length the fact that the presence of a strong firm in a market makes it difficult for a new competitior to gain entry. In the course of the discussion, he pointed out that "To justify such an investment, the entrant must be in a position to obtain a large market share within a reasonable period of time. In these circumstances, the entrant is not only being made to play the competitive game for high stakes, but, by being forced to enter on a large scale, he is virtually insuring a swift competitive response by the established firms. They might tolerate the obtaining of a small foothold by a new entrant, but they can hardly sit by while a large share of the market is absorbed by the newcomer." 63 F.T.C. 1534, 1552 (1963).

It is one thing to say that, as a matter of public policy, an established firm should not be allowed to become so strong through merger that by its very presence it tends to discourage new competitive entrants. This is one of the thrusts of section 7. It is quite another proposition to assert that the established firm must respond in damages because, before any adjudication of a violation of that section, it declined to sit by and watch the newcomer absorb a large share of its market. The principle

that an established firm may use all fair means to protect its market has long been accepted in the business community. This principle was expressly enunciated by Purex in the minutes of a conference of its executives, held at Ojai, California, in April 1954. That document recites, under the heading of liquid bleach: "The following agreements were reached on this subject: a)—that we will meet all active competition with some counter-promotion ..... couponing, etc., store sales or other ..... to protect our position in the markets." (Exhibit BQ, page 6).

I can find nothing reprehensible or anticompetitive in the Clorox response in Erie. For that firm to spend ninety cents per case in advertising and promotions might be called "sharp shooting," as the plaintiff terms it, because Clorox was never known previously to spend in excess of its profit for such purposes. However, for Purex to come in with expenditures in excess of $3.00 was also unprecedented, and an unusually large attack may be expected to elicit a comparable response.

In contrast to the plaintiff's present contentions, the Purex officials did not consider the Clorox response to their entry in Erie to be inordinately strong at the time it occurred, and there was no current suggestion that such response had anything to do with the decision to withdraw. Several documents from Purex files discuss the Erie experience. The general conclusions were that for Purex to have gained and held a 10% share of the market was a satisfactory accomplishment, particularly in view of the fact that the innovations of a new bottle with a "coffee pot" handle and the "foaming" characteristic of the bleach that Purex had sought there to introduce did not prove popular enough to justify the increase in prices that accompanied them.

A memorandum of a Purex Marketing Strategy Committee meeting on February 5, 1959, states that " . . . it was agreed that we should withdraw from the Erie Test Market on Liquid Bleach because of the problems associated with drop shipping the stores in this area which over an extended period of time results in dissatisfaction on the part of the Trade with this method of handling." (Exhibit 1640).

During the sixteen months that Purex was trying to establish itself in Erie, another competing brand, Austin's increased its market share from 5% to about 24%, despite the activities of Clorox that Purex now claims were so predatory and monopolistic.

From all of the large amount of evidence pertaining to Erie, the conclusions drawn by this court are that Purex went into Erie expecting that it would be met with a response by its competition, including Clorox; the response by Clorox was not inordinate, in view of the advertising and promotional expenditures by Purex; and that the principal reasons for the Purex withdrawal from Erie were unrelated to any actions by Clorox. To whatever extent the Clorox response may have encouraged the Purex withdrawal, such circumstance cannot be charged to the merger. Clorox did nothing in Erie that it could not or presumably would not have done had the merger never taken place.

F. *The Washing Machine Cooperative Program.* Beginning in about 1958, Clorox started proposing to washing machine manufacturers a cooperative program under which the latter would include liquid bleach dispensers in their manufactured products, along with promotional materials describing how the washing process could be enhanced by proper application of liquid bleach, particularly Clorox. By 1964, about 85% of the manufacturers of washing machines sold in the United States were participating in this program.

The plaintiff points out that Clorox never had engaged in such activity prior to the merger and that its washer-cooperative program stemmed from Procter's earlier participation in comparable programs with the same manufacturers in promoting its soaps and detergents.

There is no doubt but that the inspiration for this activity by Clorox came from Procter, and that its success was enhanced by Procter experience and research. However, I cannot agree with the plaintiff that such a program was in any way anticompetitive. Due to earlier monitoring by the Federal Trade Commission, the relationships that Clorox established

with the manufacturers were not exclusive, and the promotional materials placed in the washing machines at time of sale asserted or implied that Purex and the other liquid bleach products shared with Clorox the ability to produce the claimed superlative effect upon machine-washed clothes.

Insofar as we are aware, Purex could have established similar relationships with the washing machine manufacturers if it had chosen to do so and had gotten to them first. In fact, Purex engaged in, or at least planned for, its own cooperative program with washing machine manufacturers for the benefit of its dry bleach products. (Defendants' Exhibits CD and BO).

G. *The "Attack" On Purex In Its Home Territories.* The plaintiff complains that soon after the merger Clorox recognized that Purex was its only competitor on a national scale that had enough money, sophisticated marketing, and capacity for growth to provide a serious challenge to Clorox, and that the decision was thereupon made to keep Purex busy and in its own areas in order to frustrate its expansion into other markets. Such a battle plan and the occasional war cries that were emitted to keep up enthusiasm for it, came principally from memoranda prepared by the advertising agency employed by Clorox, rather than from executives of that company. However, even acceptance of the asserted plan at face value discloses no more than a determination vigorously to compete and to gain market share at the expense of a competitor.

As a prime revelation of predatory intent on the part of Clorox, the plaintiff makes frequent reference to a portion of an outline that was prepared in 1966 for use by a Clorox division sales manager in a presentation to a meeting of Clorox distributors:

> "Clorox position—*defend* and *protect* our business. Purex will hurt *you* only if *you* let them. Clorox will supply the gun, but *you* must pull the trigger." (Exhibit 1466).

Neither such comments nor the actions of Clorox that might be inferred to have been in furtherance thereof disclose any intention to monopolize or otherwise to deprive Purex of the

means of continuing its business. A comment by Judge Merrill in announcing the decision of the court in *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 19 (9th Cir. 1971) has particular significance here.

> "Dahl's attempt-to-monopolize claim rests entirely on its allegation that an employee of Cooper told an employee of Dahl that Cooper would drive Dahl out of business if Dahl chose to compete. Such a manifestation of intent to triumph in the competitive market, in the absence of evidence of unfair, anticompetitive or predatory conduct, is not enough to establish a violation of § 2."

IV. PUREX'S COMPARATIVE INFERIORITY IN MARKETING LIQUID BLEACH STEMMED PRINCIPALLY FROM DECISIONS OF ITS OWN MANAGEMENT, RATHER THAN HAVING BEEN IMPOSED BY CLOROX.

Throughout the period of the merger, Purex was a successful and ably managed corporation. Its annual pre-tax profits increased rather steadily from about $3.6 million in 1958 to $19.5 million in 1967. (Exhibit DE). During the same period, its pre-tax profits from the sale of its branded liquid bleach also showed steady improvement, growing from $1.7 million in 1958 to $2.7 million in 1965.[2] (Exhibit DS). This latter rate of increase was not as large as that enjoyed by the corporation as a whole, and the Purex share of the combined Purex-Clorox market for liquid bleach in the Purex area of distribution went down from 43.7% in 1958 to 37% in 1967. (Exhibits 1650, Table 4F).

The plaintiff now seeks to recover damages from the defendants because of this reduction in market share. In order to hold the defendants liable, the plaintiff must show that their illegal conduct *materially contributed* to the comparative decline

[2] The 1966 and 1967 profits from Purex branded bleach dropped to $386,000 and $527,000 respectively. This reduction appears to have been due principally to the large expenses incurred in eastern expansion during those years.

that Purex suffered in its liquid bleach business. See, *Weiman Co. Inc. v. Kroehler Mfg. Co.*, 428 F.2d 726, 729 (7th Cir. 1970). The inability of this court to accept the plaintiff's contention that the plaintiff's problems were caused by the merger or by any other conduct of the defendants cognizable under the antitrust laws has already been discussed in this memorandum. Clorox increased its ascendancy over Purex during the period of the acquisition principally because it simply did a better job in marketing liquid bleach, just as it had done before the acquisition. But even if some of the conduct of Clorox were to be deemed to have been causally related to the acquisition or otherwise anticompetitive, any effect that it may have had upon the plaintiff was far outweighed by the sum of a series of actions and policies undertaken by the plaintiff.

A. *The Plaintiff's Diversification Program Was Achieved At The Expense Of Maximum Development Of Its Liquid Bleach Business.* In about 1946, Purex management adopted the strategy of growth through product diversification, rather than remaining a one product company. This strategy was vigorously carried out, with the result that by 1968 Purex was marketing more than thirty additional products, most of which were obtained through acquisitions of other companies. By about 1953, Purex had adopted the policy of marketing and advertising its household products as a "family of brands," and it used profits from the sale of its branded liquid bleach to subsidize the development, marketing and advertising of the other members of the "family."

As has been noted above, the strategy worked very well in the financial interests of the plaintiff corporation as a whole. But it deprived Purex liquid bleach of the promotional and advertising funds that it needed in order to increase, or even maintain, its share of the market. The effect upon Purex liquid bleach was as might be expected, and danger flags were hoisted from time to time within the corporation. In October 1956, the plaintiff's marketing experts made a detailed written presentation on liquid bleach which adverted to the fact that during the past four years Purex had steadily lost market share, not only to Clorox but to the "all other" category of manufacturers as well. The study then stated that "We have all been aware of this

problem of a slowly disappearing market share, and there are several reasons behind it. We know, for example, that as a matter of policy we have devoted a considerable portion of the advertising funds earned by liquid bleach to the development of other brands of the corporation. As a matter of fact, this chart shows the relative expenditures of Clorox and PUREX; and, in the most recent year—which is the most favorable comparison, we are spending only about ⅕ of the money that Clorox is . . . ." (Exhibit 1622, pages 2-3).

In April 1957, Jack Northrup, the Purex sales manager, wrote in a memorandum that advertising support was badly needed for Purex liquid bleach ". . . because this brand has been milked so badly in past years and results are now becoming apparent in loss of market position." (Exhibit 1626, page 2). A few months later, in August, the very month in which the acquisition of Clorox by Procter occurred, a management committee of Purex, the Marketing Research Action Committee, noted in a memorandum:

"*Problem*: During the past year liquid PUREX has slightly lost both share of volume and share of families buying. This decline during the past year is part of the long-term three or four year PUREX decline which we have noticed from Nielsen reports.

"*Discussion*: It was felt that the basic cause of this decline was lack of advertising expenditures over a long period of time. The money that this brand earns has not been returned to the brand because it has been a policy of the corporation not to spend any money on this brand until there is something really worth advertising. (In the past it had been found that advertising Liquid Bleach in its current form proved to be rather unproductive.)" (Exhibit HO) (see also Exhibit AO).

Despite these and other expressions of concern, the marketing expenses for Purex liquid bleach continued at a greatly reduced level through 1964. Although sales of Purex liquid bleach suffered because of this lack of support, the corporation was willing to accept the resulting disadvantage, inasmuch as the diversion of funds to aid the development of other products

produced such pleasing results. Thus, in 1965, Mr. A. C. Stoneman, the chief executive officer, reported that the "past 10 years of Purex growth is evidence of the success of our long-range plans for expansion of Purex into a multi-product, diversified, national and international marketer."

Throughout the years between about 1953 and 1964, when Purex was withholding adequate market support from its liquid bleach as part of its corporate strategy, Clorox continued to maintain a comparatively strong advertising program for its sole product. (Exhibit ATX). These circumstances constitute the principal reason for the Purex decline in market share during the period of the acquisition.

B. *The Plaintiff Sought To Promote Its Dry Bleach At The Expense Of Liquid Bleach.* One of the plaintiff's products that it tried hard to promote during the period of the acquisition was its dry bleach that it called "Beads O' Bleach." Between 1958 and 1964, more than 30% of the sales revenue from this product were devoted to such promotions. This was made possible by cutting the expense of advertising liquid bleach to about 5.5% of its gross sales. (Exhibit ATX).

The attitude of the Purex Company with respect to such a policy was made clear at the outset in a January 4, 1956, memorandum by one of the Purex executives. He referred with approval to the idea of mounting a major advertising campaign in support of Beads O' Bleach and then said that such a plan

> "... means that liquid bleach would be without advertising pressure, except as it benefited from the reminder value of the name 'Purex' in Beads O' Bleach advertising. We plan to strongly emphasize the name 'Purex' in all Beads advertising and, of course, in Purex Dry Bleach copy. By eliminating liquid we can strengthen our Purex dry bleach advertising story, which is now emasculated by the forced combination with liquid.
>
> "Lack of advertising on Trend and liquid bleach for this period might do some damage to their sales and brand position. But we believe the risk is least

> on these brands, and one we can live with. It will have the smallest adverse effect on company profits, and offers a chance for important contributions to profit from Beads and ODC if we can get these brands moving up." (Exhibit AL).

The advertising campaign that Purex mounted on behalf of its dry bleach during the years of the merger was largely devoted to trying to persuade the public to use Beads O' Bleach *instead* of liquid bleach. Thus, support was taken from Purex liquid bleach in order to finance a sales program that was designed to harm the very source of its funds. To whatever extent such a program was successful, Purex is hardly in position to charge the defendants with responsibility for the resulting loss of sales of Purex liquid bleach.

C. *Liquid Bleach Sold Under Private Label Cut Into The Plaintiff's Branded Liquid Bleach Market.* Another way in which Purex enhanced its corporate profits at the expense of its branded liquid bleach was its practice of manufacturing liquid bleach for sale by chain stores under their private labels. During the entire period of the merger, Purex was the nation's principal supplier of private label bleach, and it sold ever-increasing quantities to more and more customers. Practically all of these customers operated chain stores, and they quite naturally gave preferential sales promotion treatment to their private label bleach. As early as 1959, the national sales manager of Purex wrote a memorandum in which he adverted to the "mounting inroads" into the Purex liquid bleach market brought about by the continued growth of "private label." He proposed a solution to this dilemma that would involve accepting a new customer for private label bleach only after careful assessment of whether such customer could get it elsewhere and whether supplying the customer with private label bleach would increase his total business with Purex. (Exhibit S).

Despite any occasional attempts to control the proliferation of private label bleach, Purex continued to increase this phase of its business. The fact that such activity was seriously harmful to sales of Purex branded bleach is clearly established in the

record. For example, on November 5, 1963, a staff memorandum submitted to the head of market research for the Purex Corporation contained an analysis of the Nielsen Reports for the years 1961 to 1963. The memorandum expressed the concern that Purex was losing its share of the chain store market business to the private labels and asserted the belief that Clorox faired [*sic*] better from such competition because "Purex appears to be a more substitutable brand than Clorox." (Exhibit DH).

On June 8, 1964, a Purex executive wrote in a memorandum that "I don't think there's any more important project than that we learn how to successfully sell Purex Liquid Bleach to the consumer in the face of increasingly vigorous Private Label competition and the increased price spread that now exists between Purex and Clorox and Private Label brands." (Exhibit AP).

As has been discussed earlier in this memorandum, the market share of the plaintiff's branded bleach declined rather steadily throughout the period of the merger, while the Clorox share increased. However, during the same period, sales of private label bleach increased much faster than did those of Clorox, a fact that reafffirms the validity of the above-mentioned concerns expressed by the plaintiff's executives that the loss of market share on Purex branded bleach was more to private label than to Clorox.

V. THE CLAIM OF PUREX THAT ITS NATIONAL EXPANSION PLANS WERE FRUSTRATED BY ITS FEAR OF POST-MERGER CLOROX IS PRINCIPALLY AN AFTER-THOUGHT INDUCED BY THE CONTEMPLATION OF THIS LITIGATION.

Another factor that prompted the divestment order, according to Commissioner Elman's opinion, was the concern that "Given Procter's materially greater strength, compared to Clorox, as a liquid bleach competitor, vigorous competition by the small firms in the industry would appear still more effectively and substantially inhibited than prior to the merger." (63 F.T.C. at 1568). The Supreme Court opinion by Justice

Douglas affirming the FTC decision agreed that "the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by . . . dissuading the smaller firms from aggressively competing." (386 U.S. 568 at 578, 87 S.Ct. 1224 at 1230, 18 L.Ed.2d 303).

The plaintiff now insists that the Procter/Clorox merger did inhibit Purex from "aggressively competing," just as the FTC and the Supreme Court had envisioned. According to the plaintiff, Purex was ready to launch a major program of expansion into the eastern areas of the United States early in 1958. Then came the massive predatory attack by Clorox upon Purex in Erie, and that experience, coupled with Purex management's knowledge of Procter's immense market power, impelled Purex to the realization that it would be impossible for it to carry out its expansion plan, and so it deferred them indefinitely. (Plaintiff's proposed findings, page 242). The plaintiff seeks to recover damages for the millions of dollars that it estimates it would have earned in additional profits had it been able to pursue its eastern expansion as scheduled.

This court is unable to accept the plaintiff's claim, for several reasons. In the first place, the Clorox response in Erie was neither predatory nor massive, under the circumstances. This conclusion has been discussed earlier in this memorandum and needs no further amplification here.

A second reason for questioning the plaintiff's contention is that the contemporaneous actions and documents of Purex give no sign of this all-pervading fear of post-merger Clorox that is now reported to have frustrated the Purex expansion plans.

Mr. A. C. Stoneman, who was chief executive officer of Purex in 1958 and for several years before and after, testified that the experience in Erie taught him that Purex could not hope to compete with Clorox on a national basis. But if that was his attitude then, it is strange that he kept it so much to himself, for neither he nor anyone else in the Purex management gave any current indication of having been given any such traumatic lesson. In August 1958, within six months after the

reportedly discouraging experience in Erie, Mr. Stoneman began negotiation for the purchase of the John Puhl Division of Sterling Drug, Inc. The John Puhl Division was the fourth largest manufacturer of liquid bleach in the country and had plants in Illinois, Ohio and Virginia. According to a memorandum written by Mr. Stoneman at the outset of such negotiations, he "explained" to the owner that "we were still interested in expanding our liquid bleach business from our area position to a national one;" and that "... we were interested in investigating the possibility of purchasing a position in markets where we did not now distribute liquid bleach prior to making plans for expansion by other means." (Exhibit BT).

One month later, Vice President Davidson submitted to Mr. Stoneman a memorandum which recommended the acquisition of the John Puhl Division "... as the most feasible step toward nationalizing Purex liquid bleach by expansion into non-Purex areas." (Exhibit CF, page 5).

The acquisition was made in October 1958 for a price of $4 million. One year earlier the asking price had been $3 million, which Mr. Stoneman then thought "sounds high." Such a transaction and the expressed reasons for it are hardly indicative of a company that has been so intimidated by the implied threats of its larger rival that it is afraid to advance into new areas.

In March 1959, the Administrative Committee of Purex prepared a sales forecast for fiscal 1960. It stated the two major problems facing Purex liquid bleach to be "(1) an upsurge of private label brands combined with (2) the forceful marketing strategy of Clorox." However, it expressed the belief that the forthcoming Purex marketing strategy would be able to make progress in solving these problems, and it referred to the matter of expanding into eastern markets and Florida as "open." (Exhibit BG, page 059).

Purex intracompany memoranda between the late 1950s and about 1965 made frequent mention of the hope and expectation of taking liquid bleach into eastern markets. However, these expressions usually acknowledged the need, first, to

find a new innovation for the product and an improved means of packaging it. One of the disappointing by-products of the test market in Erie was the realization that the adding of a foaming aspect to the bleach and the use of a new glass bottle with a "coffee pot handle" did not prove to be as popular as had been hoped. And so, the search continued for the "perfect package" and for a better innovation for the product as conditions precedent to direct eastern expansion. The importance of such a search was emphasized by Mr. Stoneman at the annual stockholders' meeting in October 1962. He was asked if Purex planned to expand its present markets " . . . so as to have national penetration of all Purex products." His response: "Our basic marketing strategy is to expand distribution of our products geographically or to reach for a larger share of existing markets when we have a product or packaging innovation to aid us in accomplishing our goals. It is relatively inexpensive to expand a product's position during a period of change as compared to the high cost of expanding market shares when the product type is static. If you try to expand your market share when the product is static you are engaging in a toe-to-toe slugfest with your competition and this is not the way to increase a corporation's net earnings." (Exhibit BL, page 31).

At the same meeting, the chairman of the board of Purex gave another significant answer to a similar question: "Eventually we will be national on bleach but we are not going to . . . make a three, four or five-year investment in this distribution in order to be national when we can get so much better return by putting this same money into other products. Eventually we will be national." (Exhibit BL, pages 55-56).

Two years later, at the 1964 stockholders' meeting, management again was asked if Purex intended to market its liquid bleach nationally. The response was given in a letter by Vice President Davidson: "If we wanted to spend the money to get national distribution on liquid bleach we could get it. But it would take a lot of money to enter markets where other brands have been entrenched solidly with retailers and consumers for many years, and we can make more money by going into other products, for example, promoting dry Beads O' Bleach." (Exhibit BK).

In about 1965, Purex came up with six percent bleach, which it proclaimed as "truly something far greater than just another liquid bleach." (Exhibit 1420, defendants' brief, page 141). At about the same time, Purex was able to produce satisfactorily a new plastic bottle that it had been working on for several years. Having found the product innovation and new package for which it long had been searching, Purex carried its liquid bleach into several of the southeastern states, and, in 1967, it went into the northeastern part of the country.

The record shows that during the entire period between 1958 and 1967, the Purex executives and the salesmen in the field wrote many communications concerning the hopes, problems, triumphs and frustrations that were experienced in contemplating, planning and carrying out the program of eastern expansion. There are frequent references to Clorox, sometimes as a major competitor, and sometimes as not having been as formidable as had been anticipated. But nowhere in the record of those years is there any suggestion that Purex must curtail its plans because of the thrashing that it otherwise would be bound to receive from Clorox under Procter ownership. The record in this case impels the conclusion that the timing and the manner in which Purex entered new markets were dictated by its own strategy as to what would best enhance the progress of the company, and that fear of Proctor/Clorox played no significant part in these decisions. This court finds the conclusion inescapable that the plaintiff saw in the divestment order an opportunity to use its newly discovered and retroactive fear as a means of obtaining a multi-million dollar windfall recovery from the defendants. The antitrust laws are little served when used in such manner.

There is an alternative reason why I cannot accept the plaintiff's claim that it should be entitled to damages because fear of the combination of Procter and Clorox discouraged Purex from competing vigorously. I can find nothing in the law, in the relevant reported decisions, or in elemental concepts of justice that would warrant giving such monumental rewards to the fainthearted.

As Commissioner Elman well stated in the opinion that inspired this litigation, "A market in which one firm enjoys, say, a share of 70%, with the balance divided among a number of other firms, will still exhibit the characteristics of oligopoly. The leader will have the kind of market power that compels his rivals to take his reactions into account in their business planning, and his disproportionate strength will tend to deter his small rivals from vigorous competitive activity." (63 F.T.C. at 1551). In a country whose economy is based upon a recognition of the value of free and open competition, these considerations provide ample justification for rendering unlawful a merger that might tend to create such an oligopoly, as Congress did in enacting section 7. But the purpose of that statute is prophylactic, not punitive; and its use in the proceedings that inspired this action was solely to forestall the possibility of anticompetitive activity or a tendency toward monopoly in the future.

The plaintiff places heavy reliance upon an opinion from the Third Circuit in *NBO Industries Treadway Cos., Inc. v. Brunswick Corp.*, 523 F.2d 262 (3d Cir. 1975), certiorari granted sub nom. *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 424 U.S. 908, 96 S.Ct. 1101, 47 L.Ed. 2d 311 (1976). There, the plaintiff, the owner of bowling alleys, contended that if certain competitors had not been acquired by the defendant, in violation of section 7, they would have failed and that their patrons thereby would have been acquired by the plaintiff. Money damages were awarded in the trial court, and although the Third Circuit reversed and remanded on other grounds, it did support the plaintiff's right to damages by holding " . . . that a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover damages under § 4 if it shows injury in fact causally related to the violator's presence in the market, whether or not that injury flows from or results in an actual lessening of competition." (523 F.2d at 273).

Treadway is the only case of which I am aware that suggests that damages may be recovered for a section 7 violation, even in the absence of anticompetitive conduct. There was no such anticompetitive conduct here, and if the above-quoted comment may be inferred to apply to a situation

in which the only causal relationship between the violator's presence in the market and the claimed injury is the plaintiff's fear of the violator's prospective competition, I cannot accept the proposition.

Clorox, before the acquisition, had the right to compete vigorously against Purex and all other bleach manufacturers, no matter how successful it might become in so doing and no matter how much its success might discourage its more timid competitors. Post-merger Clorox competed after the merger in substantially the same manner as before; a bit more aggressively, perhaps, but strictly within the rules of the marketplace, and in no sense did it act beyond the capabilities that it had before the acquisition.

In acquiring Clorox, Procter knew that it assumed the risk of an adjudication of a section 7 violation and a resulting divestiture order. But it is quite another matter to hold that Procter also assumed the risk of being liable in damages to all of Clorox's competitors in amounts equal to three times the profits they might show that they could have earned had they not been afraid to try harder. Such a liability would be an extremely large price to pay for having made a bad guess as to how the FTC and the courts would view the merger, several years after it had occurred. Not all mergers are anticompetitive, and the prospects of such traumatic liability stemming from an adverse decision would likely prevent many a merger that would have been fully consistent with the public interest.

The doctrine urged by the plaintiff would encourage a competitor, when challenged by a merger, to develop or simulate an attitude of fear and do nothing in the hope of recovering damages for loss of profits that he would have refrained from trying to earn. If the merger is ultimately upheld, the timid competitor has lost much needed ground to his rival. On the other hand, if damages are recovered, they are either a windfall or an unprecedented reward for being faint-hearted. In either event, the concept of a cause of action for damages occasioned by fear of a business rival is contrary to the long established principle that the public interest is best served when the challenge of strong competition is met head-on.

VI. NO VIOLATIONS OR ATTEMPTED VIOLATIONS OF SECTIONS ONE OR TWO OF THE SHERMAN ACT HAVE BEEN ESTABLISHED.

In view of all that has been said in this memorandum, little additional comment is needed in rejecting the plaintiff's claim of violation by the defendants of section 1 of the Sherman Act (15 U.S.C. § 1). There is no showing that Procter combined with Clorox or anyone else in restraint of trade. The record discloses no tying arrangements, no unlawful use of trade secrets, and no control of raw materials or advertising. Post-merger Clorox simply engaged in vigorous but fair competition after the merger in the same manner as before.

By the same token there was no monopoly or attempted monopoly in violation of section 2 of the Sherman Act. Nor would any attempt at such monopoly have substantial prospect of success, for, as the evidence showed, the liquid bleach business is hardly conducive to monopoly. The product is easy and inexpensive to make from raw materials that are readily available, and there are no patents or similar barriers to entry. Inasmuch as liquid bleach is relatively inexpensive and an item of frequent purchase, the housewife has repeated opportunities to transfer her patronage as promotions and price reductions and new offerings may tempt her. Throughout the period of the merger, many smaller brands competed successfully with Clorox in their respective local regions, and the growth in market share of private label, most of which was manufactured by the plaintiff, exceeded that of Clorox in some areas of the nation.

As has been discussed at length above, post-merger Clorox took market share from Purex simply because it did a better job of marketing. This cannot be equated with the type of monopolistic activity that calls for antitrust damages. *See, Telex Corp. v. International Business Machine Corp.*, 510 F.2d 894, 928 (10th Cir. 1975).

VII. CONCLUSION.

Judgment will be entered in favor of the defendants. This memorandum will constitute findings of fact and conclusions of law, as authorized by Rule 52(a) of the Federal Rules of Civil Procedure.

Opposition

Supreme Court, U.S.
FILED
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No. 81-1746

IN THE

Supreme Court of the United States

October Term, 1981

PUREX CORPORATION, a Corporation,
Petitioner,

v.

THE PROCTER & GAMBLE COMPANY,
A Corporation, and
THE CLOROX COMPANY,
A Corporation,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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April 19, 1982

QUESTION PRESENTED

Whether the decisions of this Court in *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967), and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), require rejection of comprehensive findings, entered by the district court after an extended trial and affirmed by a unanimous court of appeals, that petitioner did not suffer antitrust injury and that its alleged injuries were brought about by its own business policies and were not caused by an illegal acquisition or anticompetitive effects or acts made possible by that acquisition.

LIST OF RELATED COMPANIES

Respondent The Procter & Gamble Company has the following parent companies, partially-owned subsidiaries, and/or affiliates:

Deterperu, S.A.
Fabricas de Aceite San Jacinto Limitada, S.A.
Modern Industries Company—Jeddah
Modern Industries Company—Damman
Moroccan Modern Industries
Pars International Mfg. Co. Ltd.
Programexpo Distribucione, S.p.A.

Respondent The Clorox Company has the following parent companies, partially-owned subsidiaries, and/or affiliates:

Clorox Thailand Limited
Industries Lesedo SA de CV
National Cleaning Products Limited (in process of organization)

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STATEMENT

In *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967), this Court affirmed a determination by the Federal Trade Commission that Procter's acquisition of Clorox, the leading producer of liquid bleach, violated Section 7 of the Clayton Act.[1] Shortly thereafter, in October 1967, Purex, Clorox's principal competitor, brought this action for treble damages against Procter and Clorox claiming that it had suffered injury as the result of the acquisition in essentially two respects: (1) the Purex brand's share of the total liquid bleach market declined and (2) Purex

[1] Citations to the findings of fact of the district court (Appendix C to the Petition) are in the form: "Findings ," together with a citation to the appropriate page in Appendix C. Citations to the Petition and Appendices are in the form: "Pet. ."

was deterred from expanding the geographic distribution of that brand. (Pet. 4a, 5a.) Purex also claimed that its supposed injury had resulted from alleged violations of Sections 1 and 2 of the Sherman Act by Procter and Clorox.

After a bench trial, in which 40 witnesses were heard and a record consisting of 5400 pages of transcript and 30,000 pages of exhibits was generated (Pet. 2a n.4), the district court entered judgment in favor of Procter and Clorox (Pet. 32e). On appeal the Court of Appeals for the Ninth Circuit remanded for a determination whether Purex had suffered any compensable injury under the standards set forth in this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and its own decision in *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), both of which had been rendered subsequent to the decision of the district court. (Pet. 1d.)

On remand the district court again entered judgment for Procter and Clorox. It found, as reflected in 185 Findings of Fact, that the injuries claimed by Purex—its decreased market share and its failure to expand geographically—had not resulted from Procter's acquisition of Clorox, from anticompetitive effects or acts resulting from the acquisition, or from any anticompetitive conduct on the part of Clorox. Rather, such claimed injuries, the court found, were the consequence of internal business policy choices by Purex that were unrelated to the acquisition. (Findings 164-170, 182; Pet. 42c-43c, 46c.)

The district court found that the market share of the Purex brand of liquid bleach, which had been declining during the ten years prior to the acquisition, continued to decline for reasons unrelated to the acquisition. (Findings 143, 145; Pet. 36c, 37c.) Those reasons were rooted in longstanding Purex policies to use the substantial profits it earned from the sale of branded liquid bleach to finance a highly successful corporate diversification program (Finding 152; Pet. 39c), to favor dry bleach at the expense of its liquid bleach (Finding 156; Pet. 40c), and to sell its liquid bleach under private labels of retail chain stores at lower prices in competition with its own branded bleach (Finding 163; Pet. 42c). The district court also found that

Purex had subordinated geographic expansion of its branded liquid bleach to its corporate diversification and acquisition strategies, that those strategies determined its expansion policies, and that no aspect of the acquisition influenced Purex's expansion decisions. (Findings 146-185; Pet. 37c-47c.)

On the second appeal, the court of appeals unanimously affirmed. It determined that the district court had fully complied with the earlier mandate and had properly applied the standards set out in *Brunswick* and *Greyhound*.[2] (Pet. 3a n.6.) The court of appeals also found that the evidence sustained the specific findings of fact underlying the district court's holding that Purex did not suffer antitrust injury. (Pet. 5a.) It accordingly rejected Purex's demand for a new trial before a new judge.[3]

In its petition to this Court, Purex has abandoned its Sherman Act claims. It now contends that the lower courts "overruled" this Court's holding that Procter's acquisition of Clorox violated Section 7 of the Clayton Act and failed to recognize that this Court's decision in *Brunswick* "warranted judgment in favor of Purex," despite the specific findings of the district court that Purex failed to establish antitrust injury. (Pet. iv, 6, 17.)

REASONS FOR DENYING THE WRIT

Petitioner lost in the courts below because it failed to establish facts essential to its claim for antitrust damages. It failed to show that Procter's acquisition of Clorox or any anticompetitive effects or acts stemming from that acquisition caused its asserted injuries. The courts below took full account

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[2] The court of appeals' first decision said the district court was "not foreclosed from hearing additional evidence." (Pet. 12d n.7.) Its second decision sustained the district court's action in rejecting as untimely a motion by Purex to present additional evidence that could have been provided at the original trial. (Pet. 6a-7a.) The request to present more evidence has been abandoned in this Court.

[3] Before trial, Purex had withdrawn its request for a jury trial on the condition that the district judge then assigned, Judge Gray, try this case. (Pet. 2a n.3.)

of this Court's decision in *FTC* v. *Procter & Gamble Co.*; neither by word nor action did either court derogate from or purport to overrule that decision in any respect. Pursuant to the mandate of the court of appeals on its first review, the district court faithfully applied the teaching of *Brunswick* v. *Pueblo Bowl-O-Mat* in determining whether petitioner had suffered antitrust injury. Contrary to petitioner's claim, the lower federal courts have had no difficulty in applying *Brunswick* and no element of that decision requires clarification or elaboration. Accordingly, this case presents neither conflict nor an important unsettled issue that warrants review by this Court.

1. Despite the efforts of Purex to describe legal issues worthy of review by this Court, its claims were found below to suffer from a fatal defect not uncommon in litigation — failure of proof. This clearly appears from the second review by the court of appeals, a decision that is barely acknowledged by Purex. Concluding that the district court in response to an exacting mandate had done "exactly what we requested" (Pet. 3a n.6), the court of appeals affirmed findings that the injuries alleged by Purex had resulted from its own business policies.

The evidence central to this affirmance was provided by Purex's own witnesses and contemporaneous business records. That evidence showed that Purex had, at the end of World War II, decided to use profits from its single product, liquid bleach, to become a national conglomerate. In pursuing this effort, Purex was highly successful, and grew enormously both before and after the Procter/Clorox acquisition. Purex, as the district court found, was a successful and ably managed company throughout the period of the acquisition. Its annual pretax profits increased from $3.6 million in 1958 to $19.5 million in 1967. (Finding 146; Pet. 37c.) It completed a program of product diversification, introducing more than 30 additional products, and acquired numerous companies. (Findings 59, 66-69, 135, 147-156, 180; Pet. 13c, 14c-15c, 33c-34c, 37c-40c, 46c.) In sum, as the district court found, the Purex

> "strategy worked very well in the financial interests of the corporation as a whole." (Finding 149; Pet. 37c.)

This impressive success was achieved by Purex with the conscious realization that it would entail using bleach profits to fund its diversification and acquisition program rather than for reinvestment in or expansion of its bleach business. (Finding 151; Pet. 39c.) For example, even before the Procter/Clorox acquisition, a Purex sales manager wrote,

> "this brand has been milked so badly in the past years and results are now becoming apparent in loss of market position." (Finding 150; Pet. 38c.)

Purex, however, considered a diminished share of the liquid bleach market to represent the effect of a desirable policy choice, as indeed it proved to be. (Finding 151; Pet. 39c.)

Purex in addition undercut its own brand by selling ever-increasing quantities of the same bleach to chain stores for resale under their own private labels at prices significantly lower than those charged for the Purex brand. (Finding 157; Pet. 40c-41c.) And, in an equally bold attack on its own branded liquid bleach, Purex aggressively promoted a directly competitive dry bleach by using profits from liquid bleach sales to finance advertising largely devoted to persuading the public to use Purex dry bleach instead of liquid bleach. (Findings 152, 155; Pet. 39c, 40c.)

These are central among the reasons that led the district court to find that

> "plaintiff's own business calculus knowingly and significantly harmed the market share of the Purex brand of liquid bleach." (Finding 163; Pet. 42c.)[4]

The claim that the Procter/Clorox acquisition had deterred Purex from geographic expansion in liquid bleach was flatly contradicted by contemporaneous Purex documents, which disclose that Purex repeatedly rejected geographic expansion because it could make more money in promoting other products

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[4] Although sales of the Purex brand grew less rapidly than those of Clorox, Purex's aggregate sales of and profits from liquid bleach continued to grow after 1957. (Findings 12, 73; Pet. 3c, 16c.)

and because a new product and a new package were regarded as essential to a successful expansion.[5] (Findings 178-179, 176-177; Pet. 45c-46c, 44c-45c.) The district court determined that the testimony of Purex's chief executive officer in support of its geographic expansion claim was not worthy of belief. (Findings 65-68, 172-173; Pet. 14c-15c, 44c.) The conclusion of the district court, on all the evidence, was that:

> "The claim of Purex that its national expansion plans were frustrated by its fear of post-merger Clorox is an afterthought induced by the contemplation of this litigation." (Finding 185; Pet. 47c.)

If there is anything unique about this case it is that the evidence not merely failed to establish a causal relationship between Purex's alleged injuries and the defendants' activities but affirmatively established that Purex's own business conduct brought about those injuries. The court of appeals determined that the district court's findings that Purex suffered no antitrust injury were supported by the evidence and were dispositive. (Pet. 6a.) This is a wholly sufficient basis for rejecting the present effort to secure further review.

2. Despite the vigor with which Purex asserts that the district court has overruled this Court's decision in *FTC* v. *Procter & Gamble,* the contention is little short of frivolous. That a district court could, under any circumstances, accomplish such a tour de force, and go undetected in two reviews by the court of appeals, is difficult to believe. That the district court did not so act in this case is clear beyond doubt. The district court fully understood and never questioned the holding of this Court that Procter's acquisition of Clorox violated Section 7 of the Clayton Act. (Findings 16-18; Pet. 4c-6c.) Indeed, both lower courts have expressly held that Purex could make full use of the FTC decision in support of its case. 308 F. Supp. 584 (C.D. Cal. 1970), *aff'd,* 453 F.2d 288 (9th Cir. 1971), *cert. denied,* 405 U.S. 1065 (1972).

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[5] For example, at a stockholders meeting in 1962, the chairman of the board of Purex responded to a question concerning expansion:

> "Eventually we will be national on bleach but we are not going to . . . make a three, four or five-year investment in this distribution in order to be national when we can get so much better return by putting this same money into other products. Eventually we will be national." (Finding 178; Pet. 45c.)

The issue in the *FTC* case, as this Court stated at the outset of its opinion, was whether "Procter's acquisition of Clorox *might* substantially lessen competition or tend to create a monopoly . . . ." 386 U.S. at 570. (Emphasis added.) After noting that the FTC "had not placed reliance on post-acquisition evidence in holding the merger unlawful" (386 U.S. at 575), this Court explicitly stated that the "core question" for resolution "necessarily requires a *prediction* of the merger's impact on competition present and future." 386 U.S. at 577. (Emphasis added.)

In this private action by Purex for damages, prediction plays no part; the issue is what actually happened as the result of the acquisition. The fact of violation, as the district court put it, is not proof "that the acquisition *did* lessen competition or *did* tend to create a monopoly or *did* injure" Purex in any way. (Pet. 2e.) (Emphasis in original.) To recover damages under the antitrust laws, a plaintiff "must prove more than that [the defendant] . . . violated § 7, since such proof establishes only that injury may result." *Brunswick, supra,* 429 U.S. at 486. As this Court recently observed in a case arising under the similar operational language of the Robinson Patman Act, which is violated if the effect of certain acts "may be substantially to lessen competition," "proof of a violation does not mean that [an antitrust plaintiff] . . . has been actually 'injured' within the meaning of § 4" of the Clayton Act. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *see also id.* at 569 (concurring & dissenting opinion).

The trial in this case was held to afford Purex the opportunity "to prove injury" "by reason of" the violation "of the antitrust laws committed by Procter in having acquired Clorox." (Pet. 2e, 3e.) On the basis of voluminous evidence covering the conduct of the bleach business in the twelve years following Procter's acquisition of Clorox, the district court found that what did happen did not bear out the predictions as to what might happen. This does not mean, or even suggest, that this Court's Section 7 decision was somehow "overruled"

below. That the effect of an "acquisition may be substantially to lessen competition, or tend to create a monopoly," does not mean that it actually had that effect. The district court tested the earlier predictions against the evidence of what had actually happened in the marketplace and found that, in fact, there was no lessening of competition in the bleach market during the period of Procter's ownership of Clorox, a period in which the acquisition was constantly under review by the FTC and the courts.

Purex builds its argument for certiorari on three contentions—that the district court found that liquid bleach is "not susceptible to monopolization" (Pet. i), that it "failed to address the issue of entrenchment" (Pet. 5), and that it found that "entry barriers had not been raised as a result of the acquisition" (Pet. 9). None of these arguments provides a valid basis for review of the decisions below.

The district court addressed these issues in full detail, including an item-by-item examination of the anticompetitive acts and effects feared by the Federal Trade Commission, of Clorox's actual conduct, and of any change in attitude on the part of Purex that was a consequence of the acquisition. On all of these factual issues, the trial court found that nothing arising from the acquisition was responsible for Purex's alleged injuries. Indeed it found that the Purex market share would have declined and Purex would not have undertaken further geographic expansion even had there been no acquisition. (Findings 164-170, 181-185; Pet. 42c-43c, 46c-47c.)

Purex, moreover, is incorrect in asserting that the district court found that the liquid bleach market is not susceptible to monopolization. What the district court did find in the course of its comprehensive analysis of Purex's Sherman Act claims (Findings 129-140; Pet. 32c-35c) was that, because of its ease of manufacture, low price and high turnover, "liquid bleach is hardly conducive to monopoly."[6] (Finding 132; Pet. 33c.) The

[6] It is specious for Purex to contend that, because of this finding, the "relevant facts were never of interest to the court." (Pet. 13.) This finding was made as part of the district court's consideration of the Sherman Act's "dangerous probability" requirement; it made extensive and detailed findings on all of the relevant factual disputes in the record. These findings formed the basis for the dismissal of Purex's treble damage claim, and are not clearly erroneous. Indeed, Purex has now abandoned its Sherman Act claims.

district court further found that the evidence showed no intent to monopolize on the part of Procter-owned Clorox and no significant probability that it could achieve power to control price or exclude competition in the liquid bleach market. (Findings 127, 132; Pet. 32c, 33c.) These findings took fully into account Clorox's market shares and relied largely on the substantial sales of private label bleach by chain stores that controlled the channels of distribution through which all bleach is sold, such sales having increased much faster than those of Clorox or Purex throughout the period of the merger. (Findings 80-89, 135, 136, 130, 131, 157-163; Pet. 18c-21c, 32c-34c, 40c-42c.) The market strength of private label sales is an example of facts that could not have been anticipated by the FTC or this Court, as much of that growth came after 1960. (Finding 131; Pet. 33c.) [7]

Similarly, the effect of the acquisition upon entry barriers and the alleged entrenchment it afforded Clorox were fully litigated, not only in terms of what was predicted at the time of the acquisition bu' in terms of what did happen thereafter. Purex is wrong in claiming there were "no significant new entrants" after the acquisition. (Pet. 13.) Although there was virtually no new entry into the liquid bleach business in the ten years *prior* to the acquisition, thereafter there was enormous growth of private label sales, much of it fueled by Purex, and entry by various smaller bleach firms. (Findings 74-75, 131; Pet. 17c, 33c.) Purex achieved major expansions of its branded bleach in the Southeast and Northeast in 1966-1967, and was in

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[7] Purex is simply incorrect in asserting that these factors were "obviously present and considered when the Supreme Court found that 'Clorox enjoyed a dominant position nationally, and its position approached monopoly proportions in certain areas.' (*FTC* v. *Procter & Gamble Co.*, 386 U.S. at 578)." (Pet. 10.) It is clear that the quoted sentence is referring to Clorox's position "before the acquisition," a phrase that appears in the sentence immediately preceding the sentence Purex quotes. *See also In re Procter & Gamble Co.*, 63 F.T.C. 1465, 1583 (1963) ("In the particular circumstances here, most of the considerable amount of post-acquisition evidence introduced at the hearings was entitled to little weight.")

no way inhibited in these efforts by fear of Clorox under Procter ownership. (Findings 73, 171-185; Pet. 16c, 43c-47c.) Neither the acquisition nor any actions resulting from it rendered expansion by internal growth or acquisition by Purex or any other bleach producer economically impracticable.[8] (Findings 128, 59, 63, 68; Pet. 32c, 13c, 14c, 15c.) Purex simply failed to prove that it was barred or deterred from entering new markets.

So far as the "entrenchment" issue is concerned, the district court found that there was no decrease in the vigor of competition in the liquid bleach market following the acquisition, and that the conduct of post-acquisition Clorox did not preclude, restrict or inhibit Purex or any other firm from competing on the merits, and caused no lessening of competition. (Findings 75, 123, 125; Pet. 17c, 31c.)

Certainly the decision of this Court in *FTC* v. *Procter & Gamble* was not intended to preclude a court from inquiring, at the suit of a private damage claimant, whether the acquisition had actually had the effects which, as of 1957, it was predicted it might. Nor did this Court's decision intimate in any way the answer to that inquiry. Both *J. Truett Payne* and *Brunswick* make clear that such an inquiry must be made in private damage actions such as the present case. The inquiry is preeminently a factual one; it has now been made and the

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[8] The district court's findings regarding Erie did not "disregard" the observations of this Court in a footnote in the FTC case. (Pet. 5.) Unlike the FTC action, in this proceeding there was a full record, including a wealth of previously undisclosed contemporaneous documents from Purex's files, on Purex's experience in Erie, and particularly whether Erie served in any way to bar Purex from expanding. Those internal Purex documents made clear that the Erie episode did not frustrate any Purex expansion plans. (Pet. 5a; Findings 60-65, 90-98; Pet. 13c-14c, 21c-23c.)

Moreover, Purex's contention that the district court found that Clorox engaged in anticompetitive pricing that led to the withdrawal of Purex in Erie is unfounded. (Pet. 4.) First, the district court found that the major part of Clorox's spending in Erie was for advertising, not to reduce prices; Clorox did not sell below average or variable cost. (Finding 91; Pet. 22c.) The district court found that this advertising expenditure was justified in light of Purex's own unprecedented advertising in Erie—$3.00 a case compared to 90¢ spent by Clorox. (Finding 95; Pet. 23c.) Second, Purex was satisfied with the results it achieved in Erie and withdrew for business reasons unrelated to Clorox, a finding the court of appeals explicitly considered and did not disturb. (Pet. 5a; Findings 61-62; Pet. 13c-14c.)

findings of the district court have been affirmed by a unanimous court of appeals. There is no issue that warrants review by this Court on writ of certiorari.

3. The courts below have faithfully applied the decision of this Court in *Brunswick* v. *Pueblo Bowl-O-Mat*, and neither this case nor any other even suggests a need "to clarify the meaning of *Brunswick* for the benefit of all litigants under Section 7." (Pet. 16.)

The first decision of the district court was rendered before this Court reversed the Third Circuit's decision in *Brunswick*. The Third Circuit appeared to hold that the mere continued presence in the market of a company acquired in violation of Section 7 entitled a competitor to an award of damages. Purex vigorously urged the decision of the Third Circuit upon the district court. In its initial decision in this case, the district court refused to follow the reasoning of the Third Circuit, thus anticipating this Court's ultimate ruling that a treble damage claimant must prove that it suffered antitrust injury as the result of an unlawful acquisition. (Pet. 30e, 31e.)

In reversing the Third Circuit's holding in *Brunswick*, this Court set forth in detail the analysis to be made in assessing a damage claim arising out of a Section 7 violation. Only last term, this Court in *J. Truett Payne* again emphasized the essential difference drawn in *Brunswick* between a purely prophylactic measure, like Section 7, and a remedial measure pursuant to which damages may be awarded, like Section 4. *J. Truett Payne, supra*, 451 U.S. at 561-62. *See Brunswick, supra*, 429 U.S. at 486-89. This case presents a paradigm of that difference.

The court of appeals in its first review of the district court's action remanded for further consideration in light of the precise standards articulated in *Brunswick*, which had not been available at the time of the district court's original decision. Accordingly, the district court was directed to determine whether Purex had established (1) that the acquisition had anticompetitive effects, or that anticompetitive acts made possible by the acquisition had occurred and (2) that it had been injured as a result of such anticompetitive acts or effects. (Pet. 9d.) The district court responded to both inquiries in the negative and

upon its second review the court of appeals held that the trial judge "did exactly what we requested." (Pet. 3a n.6.)

The detailed specific findings made by the district court in applying *Brunswick*, which were affirmed by the court of appeals (Pet. 5a), constitute the precise analysis that this Court has directed in determining whether a Section 7 violation has caused compensable antitrust injury.[9]

It is understandable that Purex should be disappointed that the inquiry into antitrust injury directed by *Brunswick* failed to confirm its charges. Such disappointment does not remotely suggest, however, that there was any deviation from the analysis envisaged in *Brunswick*.

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[9] After explicitly discussing *Brunswick* and explaining the analysis directed by that decision (Pet. 2b-3b), the district court identified the considerations that entered into the prediction that the acquisition might substantially lessen competition or tend to create a monopoly. (Finding 18; Pet. 4c-6c.) These considerations—some 14 in number—comprehended every anticompetitive effect and act that could be gleaned from the opinions of this Court and the FTC. They included all the means by which it was predicted that Procter's marketing resources might enhance Clorox's competitive position, *e.g.*, joint advertising, joint promotion, use of Procter's sales force, preferred shelf space in grocery outlets, price cuts subsidized by Procter. The court then proceeded to examine the evidence to ascertain whether and to what extent these apprehended effects and acts materialized. Following a series of factual findings dealing with each of the identified effects and acts (*e.g.*, Findings 19-79; Pet. 6c-18c) the court concluded that Procter's acquisition of Clorox did not have anticompetitive effects in the bleach market. (Finding 78; Pet. 17c-18c.)

Purex also asserted that certain specific marketing actions by Clorox were made possible by the acquisition and were anticompetitive: level of marketing expenditures (Findings 80-89; Pet. 18c-21c); Clorox's response to the entry of Purex in Erie (Findings 90-98; Pet. 21c-23c); use of bleach boards to gain shelf space (Findings 99-106; Pet. 24c-26c); advertising reference to "weak bleach" (Findings 107-110; Pet. 26c-27c); use of the so-called litmus test (Findings 111-115; Pet. 27c-29c); and a Clorox washing machine cooperative program (Findings 116-121; Pet. 29c-30c). The court examined in detail in the findings noted above the evidence relating to each of these marketing practices. Its reasoned conclusion was that they were not made possible by the acquisition, that Clorox "simply engaged in vigorous but fair competition after the acquisition in the same manner as before," that there was "no evidence . . . that Clorox would not have engaged in the same or comparable conduct absent the acquisition," and that Clorox's competitive efforts were reasonable. (Findings 122-125; Pet. 31c.)

Finally, there is no merit to Purex's assertion that *Brunswick* has engendered "widespread confusion concerning the requirements of Section 7" that should be clarified by this Court. (Pet. 16.) Purex cites no cases for this proposition, and its reliance upon a law review commentary is misplaced: Note, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.: Injury and Causation Under Sections 4 and 7 of the Clayton Act*, 10 Sw. U.L. Rev. 667 (1978). The passage cited by Purex (*id.* at 676), and other portions of this commentary (*e.g., id.* at 684-88), make clear that the Note is discussing confusion that existed in the lower courts before, not after, this Court's decision in *Brunswick*. Contrary to the implication of the Petition, the Note praises *Brunswick* for clarifying the elements of a Section 7 claim, and demonstrates that it could not be clearer what those requirements are. *See, e.g.*, 10 Sw. U.L. Rev. at 684 ("The *Brunswick* decision may be commended not only for allowing the cause of action, but also for articulating the nature of injury and causation that must be shown."); *id.* at 697 ("The *Brunswick* decision brings order out of chaos by recognizing that injury and causation issues cannot be analyzed in a vacuum.").

Decisions since *Brunswick* bear out this conclusion. Not a word in this Court's decision in *J. Truett Payne* reflects the slightest difficulty in understanding and applying the unequivocal mandate of *Brunswick*. Despite the variety of factual situations and legal claims involved in the cases in lower courts, including cases arising under provisions of the antitrust laws other than Section 7, there is absolutely no evidence that any court has had the slightest doubt as to what *Brunswick* requires as proof of antitrust injury. *See, e.g., A.D.M. Corp.* v. *Sigma Instruments, Inc.*, 628 F.2d 753, 754 (1st Cir. 1980) (per curiam); *Almeda Mall, Inc.* v. *Houston Lighting & Power Co.*, 615 F.2d 343, 353-55 (5th Cir.), *cert. denied*, 449 U.S. 870 (1980); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 296-98 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Lee-Moore Oil Co.* v. *Union Oil Co. of California*, 599 F.2d 1299, 1302-07 (4th Cir. 1979); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 831-33 (7th Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied so that this litigation, commenced fifteen years ago, challenging an acquisition made twenty-five years ago, which has been twice considered by the district court and twice by the court of appeals, can be finally brought to an end.

Respectfully submitted,

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Petitioner's Reply Brief

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a corporation,

Respondents.

Reply Brief of Petitioner

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Reply Brief of Petitioner

Petitioner Purex Corporation ("Purex") submits this Brief in reply to the contentions raised in Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Brief in Opposition").

In its Petition for Writ of Certiorari ("Petition"), Purex demonstrated that by rejecting the possibility that the liquid bleach industry is susceptible to monopolization, the District Court, in effect, overruled this Court's prior conclusion on the same issue. Respondents express disbelief that such a "tour de force" by the District Court could "go undetected in two reviews by the court of appeals." (Brief in Opposition at 6.) In fact, the District Court's finding did not go "undetected"; the Ninth Circuit expressly criticized the finding when it initially reviewed this case: "The district court's observation that 'the liquid bleach business is hardly conducive to monopoly,' fails to take into account the evidence of Clorox's enormous market

shares in certain regional markets." (*Purex Corp. v. Procter & Gamble Co.*, 596 F.2d 881, 890 (9th Cir. 1979); Petition at 14d.) On remand, however, the District Court made an *identical* finding. (Finding on Remand ("FR") 132; Petition at 33c.) On Purex's subsequent appeal, the newly constituted panel of the Ninth Circuit failed even to mention the very finding that had been singled out for criticism by the first panel.

The "enormous market shares" of Clorox were viewed with great concern by this Court when it affirmed the FTC's ruling that Procter's acquisition of Clorox violated the antitrust laws. (*See FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578 (1967).) For the District Court twice to "fail to take into account" those market shares was clearly erroneous and inconsistent with this Court's view that Clorox's market shares were dangerously high. The significance of the District Court's error is compounded by the fact that Clorox, although chemically identical to other liquid bleaches, utilized extensive advertising to differentiate itself from other bleaches to such an extent that it was able to charge a price higher than those charged by other brands. (*In re the Procter & Gamble Co.*, 63 F.T.C. 1465, 1538-39 (1963).) When faced with nearly identical circumstances, the Sixth Circuit recently concluded that the dominant firm in the reconstituted lemon juice market had monopolized the industry in violation of Section 2 of the Sherman Act. *See Borden, Inc. v. FTC*, ____ F.2d ____, 42 Antitrust & Trade Reg. Rptr. 541 (6th Cir. 1982), in which the court declared:

> A highly successful brand name and product differentiation achieved through extensive advertising over the years, standing alone, does not create a presumption of monopoly power. When a seller possesses an overwhelmingly dominant share of the market, however, and differentiates its product from others through a recognized and extensively advertised brand name, thereby enabling the seller to control prices or unreasonably restrict competition, then monopoly power may be found to exist.

(*Id.* at 546.) Respondents' assertion that the District Court's "findings took fully into account Clorox's market shares" (Brief

in Opposition at 9) is simply incorrect. If the lower court had, in fact, fully taken into account Clorox's ever-increasing market shares and the ever-decreasing share held by Purex brand bleach (*see* FR 79), in conjunction with Clorox's success in differentiating itself from other liquid bleaches, the court would have concluded that Clorox became further entrenched in the liquid bleach market as a result of its association with Procter, just as this Court and the FTC feared would happen.

Respondents attempt to downplay the gravity of the District Court's mistake by arguing that the court simply focused on what actually transpired in the liquid bleach industry following the acquisition and concluded that "what did happen did not bear out the predictions as to what might happen." (Brief in Opposition at 7.) But the District Court went far beyond merely "test[ing] the earlier predictions against the evidence of what had actually happened in the marketplace . . . ." (*Id.* at 8.) The court went so far as to decide exactly what was *possible* in the liquid bleach industry, not simply what in fact occurred. In ruling that the liquid bleach industry is not conducive to monopoly, the District Court intruded squarely on an issue that had already been considered and settled by this Court. Implicit in this Court's finding of a Clayton Act Section 7 violation was a finding that the liquid bleach industry *is* capable of being monopolized. Unfortunately, the District Court ruled otherwise and prepared its opinion accordingly.

Purex, of course, recognizes that a mere showing that section 7 has been violated does not carry the day in a private action for treble damages under section 4.[1] The trier of fact must determine whether the acquisition actually produced the anticompetitive effects or made possible the anticompetitive

[1] It is unclear exactly what sort of conduct must be shown by a section 4 plaintiff seeking damages for a violation of section 7. Indeed, this is one of the questions left open by this Court's decision in *Brunswick*. (*See* Note, "*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*: Injury and Causation under Sections 4 and 7 of the Clayton Act," 10 Sw. U.L. Rev. 667, 693 (1978) ("The *Brunswick* decision left open the issue of precisely how culpable the defendant's conduct must be in order for a sections 4 and 7 plaintiff to recover. Clearly, the plaintiff must prove more than a section 7 violation; on the other hand, it need not prove a Sherman Act violation.").)

acts cited in support of the original determination that the acquisition was unlawful, and whether the plaintiff was injured as a result of those effects or acts. (*Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). *See J.Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-62 (1981).) However, the District Court below was not content to confine its inquiry to the post-merger conduct of the parties in the marketplace. Instead, the court, duplicating the previous efforts of both this Court and the FTC, reexamined the structure of the liquid bleach industry and reached a conclusion at odds with this Court's own view.

Further, as Purex has already shown (*see* Petition at 9 n.1), this Court's opinion in *FTC v. Procter & Gamble Co.* was not simply a prediction, as respondents attempt to portray it (*see* Brief in Opposition at 8, 10). Both the majority and concurring opinions of this Court relied upon post-merger evidence (specifically, evidence of Respondents' conduct in Erie, Pennsylvania) to support their respective conclusions that barriers to entry were in fact raised as a result of the acquisition. (*See FTC v. Procter & Gamble Co.*, 386 U.S. at 579 n.3; *id.* at 601 n.17 (Harlan, J., concurring).) Whether or not post-merger evidence *ought* to be considered in section 7 proceedings, the fact is that such evidence *was* considered by this Court when it ruled that the acquisition tended to lessen competition and to create a monopoly in the liquid bleach industry. The District Court obviously disagreed with this Court's analysis of the Erie incident inasmuch as the lower court characterized Respondents' conduct in Erie as simply "vigorous but fair competition." (FR 94; Petition at 22c.) The lower court's blatant disregard for this Court's earlier conclusion should not be permitted to stand.

Respondents rehash many of the District Court's findings on remand, arguing that Purex simply failed to prove its case. (*See* Brief in Opposition at 4-6.) Respondents' emphasis on the findings is unavailing since the findings themselves are fatally tainted by the District Court's erroneous premise that the liquid bleach industry is hardly conducive to monopoly, and by the court's resulting failure to appreciate the overwhelming evidence that Clorox became further entrenched as a consequence

of the acquisition. (*See* Petition at 12-13.) Given the trial court's mistaken perception of the nature of the liquid bleach industry, Purex's market share evidence was doomed to fall on deaf ears, as was Purex's demonstration that entry into new geographical markets, *e.g.*, Erie, became more difficult following the merger.

Respondents focus on the District Court's conclusion that Purex suffered no antitrust injury and on the cursory affirmance of that conclusion by the Ninth Circuit. (Brief in Opposition at 3, 6.) Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." (*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).) However, the District Court did *not* find that the post-merger activities of Procter and Clorox had no impact on Purex, but rather that the activities were laudatory and, therefore, could not have an impact cognizable under the antitrust laws. The District Court *did* find that Clorox took market share from Purex (419 F. Supp. at 949; Petition at 32e), that Clorox became more efficient[2] (419 F. Supp. at 936; Petition at 7e), that Clorox made extensive use of Procter resources and advertising discounts (419 F. Supp. at 935-36; Petition at 6e-7e), and that Procter/Clorox undertook a plan intended to attack competitors thereby preventing them from expanding (419 F. Supp. at 942; Petition at 19e-20e). Clearly, the lower court found the requisite impact, yet it ruled that the conduct giving rise to this impact was nothing more than "vigorous but fair competition," which conduct cannot support a recovery under the antitrust laws. The lower court's characterization of Respondents' conduct as innocent competition is squarely at odds with the earlier views of this Court

[2] The lower court could not have meant "efficient" in the traditional economic or social sense as no evidence was presented to show that Procter/Clorox produced or sold bleach at a lower cost or that they improved the product following the merger. The court apparently equated increased profitability with efficiency, but Respondents' increase in profits stemmed from increased sales and market share, not from efficiency. Furthermore, the FTC found that any "efficiencies" resulting from the merger did not represent a "net social benefit," but were of a kind independently *offensive* to the antitrust laws. (In re the Procter & Gamble Co., 63 F.T.C. at 1580-81.)

and the FTC, both of which cited just such conduct in ruling that the merger might tend to lessen competition in the liquid bleach market. (*See* Petition at 6-9.) Obviously, this Court and the District Court hold vastly different views as to the legal significance of the effects and acts that were likely to flow, and did flow, from this acquisition. This Court's view must prevail over the District Court's contradictory position. (*See* Petition at 14.)

Respondents also cite the District Court's findings that Purex was a successfully managed company throughout the period of the acquisition and that Purex's pretax profits increased during that time. (Brief in Opposition at 4.) Respondents, like the District Court, apparently believe that because Purex was a profitable company during the period of acquisition, any injury suffered by Purex must have been minimal. This, of course, is not the law:

> The "injury" in the typical antitrust case is . . . *relative* in nature. No matter how thriving his business may be, no matter how large his rate of profit may be, no matter how impressive his annual report may be, the substance of his claim is that he would have been even *better off* if the defendant's alleged misdeeds had never taken place.

Pollock, "The 'Injury' and 'Causation' Elements of a Treble-Damage Antitrust Action," 57 Nw. U.L. Rev. 691, 694-95 (1963) (emphasis in original).

Respondents criticize Purex for asserting that there were no significant new entrants in the industry after the acquisition (Brief in Opposition at 9), yet Respondents cite no evidence to the contrary. They merely restate the District Court's finding that "various smaller bleach firms" entered the market during the period of the acquisition. (*Id.*) In light of Procter's profitability and the tremendous market shares it was able to maintain during the period of the acquisition (market shares of up to 75% (FR 13; Petition at 3c)), *significant* new entrants *should* have appeared. The fact that they did not is telling, although the District Court apparently had no interest in this fact.

With respect to the need for clarification of this Court's opinion in *Brunswick* (*see* Petition at 16), Respondents cite several circuit court opinions in which *Brunswick* is mentioned and conclude that "there is absolutely no evidence that any court has had the slightest doubt as to what *Brunswick* requires as proof of antitrust injury." (Brief in Opposition at 13.) The fact that Respondents were able to locate a few cases which reflect no uncertainty as to the meaning of *Brunswick*[3] hardly establishes that no elucidation of that case is necessary or desirable. Significantly, Respondents cite no opinions from the Ninth Circuit, and with good reason. The Ninth Circuit has said this about *Brunswick:* " Whether *Brunswick* applies to suits brought under Sections 1 and 2 of the Sherman Act is unclear; so too is the distinction between the concepts of standing and antitrust injury." (*Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1386 (9th Cir. 1982) (footnotes omitted).) An even greater uncertainty surrounds the degree of culpability of defendant's conduct that plaintiff must show to recover damages for a violation of section 7. (*See* note 1 *supra*). This uncertainty permitted the District Court to view as "vigorous but fair competition" conduct that was clearly anticompetitive, even if permissible under the Sherman Act. (*See, e.g.*, FR 94-95, 105, 109, 114; Petition at 22c-23c, 26c, 27c, 29c.)

In short, a clarification of *Brunswick* by this Court would be of great service both to the business community and to the antitrust bar. In the present climate of "merger mania" (*see* Petition at 16), it is essential for the business community to know the extent to which growth through acquisition may give rise to substantial damages in private litigation. Similarly, the antitrust bar requires certainty, clarity and predictability in the law in order to properly advise its clients and prevent antitrust

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[3] In fact, two of the cases cited by Respondents contain no substantial discussion of *Brunswick* at all but simply cite the case for the proposition that the plaintiff in an antitrust action must prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." (*See* A.D.M. Corp. v. Sigma Instruments, Inc., 628 F.2d 753, 754 (1st Cir. 1980) (*per curiam*); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).)

violations from occurring. If section 7 is to function properly as the prophylactic measure that Congress intended it to be, its relation to section 4 and the private damage action must be absolutely clear. The present case affords this Court an excellent opportunity to provide this much needed clarity.

For the reasons discussed above, Purex respectfully renews its request that this Court grant the Petition for Writ of Certiorari and review the decision below.

Respectfully submitted,

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